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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1991

HOWARD H. GILBERT, JR., ET AL.,
PETITIONERS,

v.

CITY OF CAMBRIDGE AND
CAMBRIDGE RENT CONTROL BOARD,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Can a municipality constitutionally prohibit an owner of residential property from removing the property from the rental market, while simultaneously requiring the owner to rent the property at a below-market controlled rent?

2. Must a plaintiff sue for damages in state court before obtaining a federal declaratory judgment that an ordinance unconstitutionally takes property without just compensation, where every state court decision on point has held that invalidation, not damages, is the only remedy for legislation that takes property?

LIST OF PARTIES

The petitioners, all of whom were the plaintiffs below, are Howard H. Gilbert, Jr., Lucinda C. Gilbert, Charles L. Giles, Linda M. Jones, Robert A. Jones, Carmella A. Kenny, Elaine M. Pilla, Donald F. Thayer, Jr., Douglas G. Thayer, Jane G. Thayer, Marjorie E. Thayer, Southview Cooperative Housing Corporation, Benjamin Butcher, Donald B. Zinn, and Jonathan Keyes.

The respondents, both of whom were the defendants below, are the City of Cambridge and the Cambridge Rent Control Board.

Petitioner Southview Cooperative Housing Corporation has no parent, subsidiary, or affiliates to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Howard H. Gilbert, Jr., Lucinda C. Gilbert, Charles L. Giles, Linda M. Jones, Robert A. Jones, Carmella A. Kenny, Elaine M. Pilla, Donald F. Thayer, Jr., Douglas G. Thayer, Jane G. Thayer, Marjorie E. Thayer, Southview Cooperative Housing Corporation, Benjamin Butcher, Donald B. Zinn, and Jonathan Keyes respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in the above proceeding on May 3, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 932 F.2d 51, and is reprinted in the appendix, p. A-1, *infra*. The opinion of the United States District Court for the District of Massachusetts is reported at 745 F. Supp. 42, and is reprinted in the appendix, p. A-30, *infra*.

JURISDICTION

Invoking federal jurisdiction under the Constitution of the United States, 42 U.S.C. § 1983, and 28 U.S.C. § 1331 and § 1343, petitioners brought this action in the United States District Court for the District of Massachusetts on May 27, 1988. On August 9, 1990, the District Court granted respondents' motion to dismiss. On petitioner's appeal, the First Circuit, on May 3, 1991, entered a judgment and opinion affirming the District Court's judgment. No rehearing was sought. The jurisdiction of this Court to review the judgment and opinion of the First Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to Rule 14.1(f), the following constitutional provisions, statutes, ordinances, and regulations are reprinted in the appendix: U.S. Const. amends. V and XIV § 1; 28 U.S.C. § 2201(a); Mass. Gen. Laws Ch. 79 § 10; Cambridge, Mass. Ordinance 966; and Cambridge Rent Control Board Regulations Nos. 13, 46, and 48.

STATEMENT OF THE CASE

Petitioners collectively own 275 units in five residential rent-controlled buildings in Cambridge, Massachusetts. They wish to remove their properties from the rental market. In May 1988, they instituted this action for declaratory relief under the Constitution of the United States, 42 U.S.C. § 1983, and 28 U.S.C. § 2201. The complaint alleged that Cambridge's Removal Ordinance — which makes it unlawful to remove rent-controlled housing units from the rental market — has taken the petitioners' property without due process of law and without just compensation in violation of their rights under the Fifth and Fourteenth Amendments. The First Circuit below held the Ordinance constitutional.

The Ordinance compels owners of rent-controlled units to keep their units in the rental market if such units were rent-controlled in August 1979. Ord. 966, §1(b), (c), and (e).[1] Approximately 20,000 such units in Cambridge are so restricted. If an owner keeps a controlled unit vacant for more than 120 days, repairs or improves the unit in a way that prevents residential occupancy during the work, or makes any use of the unit other than renting it to a tenant, the Ordinance is violated. *Id.* § 1(b) and (c). There are criminal penalties for violating the Ordinance. 1976 Mass. Acts c. 36, §12(c). See

[1] The Ordinance is reproduced in the appendix at p. A-59, *infra*.

Commonwealth v. *Kapsalis*, 26 Mass. App. Ct. 448 (1988) (affirming prison sentence for landlord who violated the Ordinance). For repeated or flagrant violations, the Ordinance also authorizes Cambridge to take the unit by eminent domain. Ord. 966, §1(f).[2]

An owner can apply to respondent Cambridge Rent Control Board for permission — in the form of a removal permit — to remove a unit from the rental market. Ord. 966, §1(c). However, no one has an entitlement to a removal permit. There is no statutory standard that, if met, would require the Rent Board to waive the Ordinance's restrictions and issue a removal permit. Ord. 966, §1(d).[3] Furthermore, an owner of a unit whose permit request is denied may never re-apply, unless the Rent Board is satisfied that there is a significant change in material facts. Rent Reg. Series 46-09(a).

The Ordinance was adopted in 1979 as an alleged emergency measure to stem a perceived erosion in the supply of affordable rental housing units. Had the complaint not been dismissed, petitioners would have proven that there is no emergency and that the Ordinance is a virtual self-fulfilling prophecy in that, among other things, rent control attracts tenants to Cambridge, and causes tenants to remain who might otherwise relocate, thus perpetuating any alleged shortage of low-cost housing that supposedly justifies the Ordinance's existence.

The petitioners wish to remove their units from the rental market and create condominium or cooperative housing.[4] To

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[2] The Ordinance has a narrow exception that allows an owner of a building to occupy up to five units in non-condominium buildings that contain more than 10 units. Ord. 966, § 1(b)(4); Rent Reg. Series 13-01(w). Even assuming the applicability of this exception to the petitioners' properties, 250 of petitioners' units are required to remain in the rental market.

[3] In the event a removal permit is issued, the permit is guaranteed to be valid for only one year. Ord. 966, §1(c). After that, if the Rent Board decides that circumstances do not warrant the permit, it will be revoked. *Id.*

[4] The petitioners' properties have been in the same equitable ownership since before Cambridge adopted rent control or removal restrictions.

do so, they must remove their tenants, whose occupancy is guaranteed under the Ordinance (unless the Rent Board waives the Ordinance by granting removal permits). Some of the petitioners applied for removal permits in 1980 and were denied.[5] The other petitioners have never applied for permits. All petitioners contend that it is unconstitutional for Cambridge to subject them to a permit process, and that they have a constitutional right to remove their units from the rental market without having to apply for permission to do so. Further, the complaint alleged, and — if necessary — the petitioners would have proven, that it would have been futile to apply for permits.

As pertains to this petition, the theory of the complaint was twofold. First, the Ordinance has taken petitioners' property without just compensation because it authorizes a permanent physical occupation of petitioners' property by tenants and does not provide compensation for the property rights taken. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983) (Rehnquist, J., dissenting). Further, it does so while a separate rent control law limits the rents petitioners may collect, and while there is no emergency in fact. *Bowles* v. *Willingham*, 321 U.S 503 (1944); *Block* v. *Hirsh*, 256 U.S. 135 (1921). Second, the Ordinance has taken petitioner's property without due process. *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S 522 (1923); *Rivera* v. *R. Cobian Chinea*, 181 F.2d 974 (1st Cir. 1950).

In granting respondents' pre-answer motion to dismiss, the District Court relied largely on procedural grounds. First, the District Court held that a declaratory relief action challenging the facial validity of a statute is barred by Massachusetts' statute of limitations for personal injury actions three years after the statute's adoption (p. A-37, *infra*). Second,

[5] The complaint alleged that, as to those petitioners, there has not been a significant change in the material facts. Hence they are barred from reapplying. Rent Reg. Series 46-09(a).

the District Court determined that the Ordinance's validity as it applied to petitioners depended on whether the Rent Board refused to issue removal permits to petitioners (p. A-37, *infra*). Thus, as to those petitioners who had been denied permits in 1980, the District Court held that Massachusetts' statute of limitations for personal injury actions barred a declaratory relief action three years after the permits were denied (p. A-37, *infra*). As to those petitioners who had not yet applied for permits, the District Court held their declaratory relief action premature (p. A-45, *infra*). Third, the District Court held that declaratory relief as to the Ordinance's validity under the Just Compensation Clause could not be granted until after petitioners sued respondents for damages in state court (p. A-50-51, *infra*). Fourth, the District Court held on the merits that the Ordinance was constitutional under the Due Process Clause because there was a conceivable rational relationship between the end it sought to achieve — the preservation of affordable housing — and the means selected to accomplish that end (p. A-46, *infra*).

Petitioners appealed. The First Circuit did not adopt the District Court's holding that petitioners' claims of facial invalidity were time-barred three years after the Ordinance's adoption, stating it "consider[ed] this ruling problematic" (p. A-9, *infra*). Instead, the First Circuit decided the merits and held the Ordinance constitutional on its face (p. A-8-9, *infra*). Applying statements that this Court has used in regulatory takings cases, and rejecting reasoning that has governed this Court's decisions in physical occupation cases, the First Circuit opined that the Ordinance did not foreclose "an economically viable use" because (a) it contained a permit procedure that left open the possibility the Rent Board might waive the Ordinance's restrictions, and (b) if a removal permit were denied, the Ordinance still allowed owners to collect controlled rents that, under the rent control law, are supposed to yield a "fair net operating income" (p. A-8-9 *infra*). The First

Circuit also affirmed the District Court's holding that there was no violation of the Due Process Clause because there was a conceivable rational relationship between the Ordinance and its objective of providing low-cost housing (p. A-26-27, *infra*). In addition, the First Circuit held that a federal declaratory judgment action could not be brought under the Just Compensation Clause until after petitioners sued in state court for damages (p. A-21-26, *infra*).

The First Circuit also affirmed, on procedural grounds, the dismissal of petitioners' claims that the Ordinance was unconstitutional as applied, reasoning that an action for declaratory relief that the Ordinance was unconstitutional as applied did not ripen until removal permits were denied (p. A-10, *infra*). Thus, according to the First Circuit, petitioners whose removal applications were denied in 1980 were foreclosed by Massachusetts' three year statute of limitations for personal injury actions; petitioners who had not yet applied for permits filed suit prematurely (p. A-10-21, *infra*).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted to Decide Whether a Municipality Can Constitutionally Prohibit an Owner of Residential Property from Removing the Property From the Rental Market, While Simultaneously Requiring the Owner to Rent the Property at a Below-Market Controlled Rent

The First Circuit's holding permits municipalities to force a private owner of residential property to provide low-cost rental housing, against the owner's wish to exclude tenants altogether and to use and occupy the property in a different and otherwise lawful manner. Such a drastic encroachment on one's rights of property deserves this Court's attention.

This case is unlike rent control cases this Court has decided

in that, in such cases, the property owner has had the option of not renting to tenants. *Federal Communications Commission* v. *Florida Power Commission*, 480 U.S. 245, 251-53 (1987) (where government does not force landlord to enter into, renew, or refrain from terminating leases, government may control rents so long as rents allowed are not confiscatory); *Bowles* v. *Willingham*, 321 U.S. 503, 517 (1944) (rent control statute valid which did not "require any person . . . to offer any accommodations for rent"). This case thus presents the question, expressly reserved in *Federal Communications Commission* v. *Florida Power Commission*, 480 U.S. 245, 251-52 n.6 (1987), whether the government can force property owners into tenancy relationships against the owner's will and simultaneously mandate controlled rents.

A. *The First Circuit's Decision That The Ordinance Does Not Violate The Just Compensation Clause Conflicts With Decisions Of This Court*

The First Circuit's ruling, that the government may force unwilling property owners to rent their property to tenants without compensating the owners for the loss of the right to exclude others, directly conflicts with this Court's ruling in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, this Court held that there was a taking per se, for which the Constitution required just compensation, when a regulation forced an owner of an apartment building to allow a cable television operator to use space on the building's exterior to run a cable. The Court ruled that a law unconstitutionally takes property when, without providing just compensation, it authorizes a permanent physical occupation of property, regardless of the public interests the law serves. *Id.* at 426. This is so, "without regard to other factors a court might ordinarily examine." *Id.* at 432. It is immaterial "whether the State, or instead a party authorized by the State,

is the occupant." *Id.* at 432 n.9. In words particularly relevant to this case, this Court said that the rule applies to laws "requir[ing] a landlord to suffer the physical occupation of a portion of his building by a third party." *Id.* at 440.

The conflict between *Loretto* and the decision below could not be more complete. In 1983, Justice Rehnquist analyzed the same Cambridge ordinance now at issue, in his dissent from this Court's dismissal of the appeal in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983).[6] Observing that the Ordinance forced owners' to suffer the presence of tenants against the owners' will, and finding "little to distinguish this case from [*Loretto*]," Justice Rehnquist wrote that the Ordinance "effected a permanent physical occupation of appellant's property." *Id.* at 877. Justice Rehnquist would have noted probable jurisdiction in *Fresh Pond* because the Ordinance "presents important and difficult questions concerning the application of the Takings Clause." *Id.* at 876.[7]

The First Circuit below, however, viewed the Ordinance much differently than did Justice Rehnquist, declaring that the Ordinance does not authorize a "permanent physical occupation of the kind envisioned in *Loretto*" (p. A-14, *infra*). Saying that *Loretto* "was not to be employed to challenge settled doctrine [concerning] regulation of rental housing," the First Circuit distinguished *Loretto* by equating physical

[6] The procedural peculiarities that may have motivated this Court to dismiss the appeal in *Fresh Pond* are not present here, making this case a more appropriate vehicle for reviewing the constitutionality of the Ordinance. In *Fresh Pond*, a superior court judge, in an unreported decision, rejected a constitutional challenge to the Ordinance where a property owner wished to demolish a residential building to create a parking lot. An equally divided Massachusetts Supreme Judicial Court affirmed the lower court without opinion. *Fresh Pond Shopping Center, Inc.* v. *Rent Control Board*, 388 Mass. 1051 (1983). As a summary decision, the state court's affirmance has no precedential effect. *Lyons* v. *Labor Relations Commission*, 19 Mass. App. Ct. 562, 566 & n.7 (1985). For these reasons, one high court jurist has said that this Court's dismissal of *Fresh Pond* "creates no persuasive, let alone binding, authority for anything." *Nash* v. *City of Santa Monica*, 37 Cal.3d 97, 113 (1984) (Mosk, J., dissenting).

[7] The First Circuit also recognized this case as raising "potentially important constitutional issues" (p. A-29, *infra*).

occupation" with "the placement of a fixed structure on land or property" (p. A-14, *infra*), as if to suggest that the Constitution protected property owners from intrusive structures, not intrusive persons. This distinction directly conflicts with *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), where this Court invalidated — as a permanent physical occupation — a condition on a building permit that required a landowner to allow a public right of passage over the owner's beach for individuals "to pass to and fro." *Id.* at 832.

Not wishing to hold that regulation of rental housing could never result in a *Loretto*-type taking, the First Circuit left open the possibility of a constitutional impropriety where government action "actually changes control over, as well as occupation and use of, the property" (p. A-15, *infra*). But the Takings Clause is triggered when the government authorizes another's occupation and removes an owner's right to exclude others. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36, 438 n.16 (1982). Control of the property was not at issue in *Loretto*, except in the same sense here where the occupier, by merely occupying, controls the space to the extent occupied, thus preventing the owner or the owner's designee from occupying that space or making a non-possessory use of it. *Id.* at 436. It is "required acquiescence [which] is at the heart of the concept of occupation." *Federal Communications Commission* v. *Florida Power Commission*, 480 U.S. 245, 252 (1987). The taking arises by extinguishing the owner's right to exclude. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979).

The First Circuit's refusal to recognize the Ordinance as involving a *Loretto*-type taking accounts for its holding that the Ordinance is constitutional on its face. In *Loretto*, this Court drew a crucial distinction between laws that authorize a permanent physical occupation of property — even if the law causes only a minimal economic impact on the owner — and laws that "regulat[e]. . .the *use* of property. . . ." *Loretto* v.

Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (emphasis in original). Laws that merely regulate use are "analyzed under the multi-factor inquiry generally applicable to non-possessory governmental activity." *Id.* at 440.

For use regulations, this Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). One factor taken into consideration, though, is the regulation's economic impact. *Id.* To pass muster, use regulations must not "den[y] an owner economically viable use of his land." *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). But when a law authorizes a permanent physical occupation of property, the taking occurs by the physical occupation so authorized, even if the owner still has a viable economic use. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982). Thus, a taking was found in *Loretto*, despite the fact that the intrusion did not deprive Mrs. Loretto of a viable use of her apartment building.

Because it viewed the Ordinance as a use regulation, and not as a law authorizing a permanent physical occupation, the First Circuit mistakenly deemed itself controlled by *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (p. A-8, *infra*). In *Riverside Bayview Homes*, this Court held that use regulations were not facially unconstitutional if the owner could have — through a permitting process or otherwise — development rights that would yield a viable economic use.

> [T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the

> owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id. at 127 (permit required to fill navigable waters).

The First Circuit borrowed this jurisprudence from the law governing use regulations and transferred it to a law authorizing a permanent physical occupation. Thus, the First Circuit held that the permit procedure saves the Ordinance from facial invalidity because viable economic uses were not rendered impossible under the Ordinance: if a permit is granted — an owner may remove the property from the market, and — if a permit is denied — the ordinance "preserves an economically viable property use to landlords" since owners may collect a statutorily defined rent-controlled "fair net operating income" (p. A-8-9, *infra*). But see *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting) (provision of fair net operating income should not change the result).

In assessing the significance of a permit procedure, the distinction is critical between statutes that authorize a permanent physical occupation and those that merely regulate use. Where a statute authorizes a permanent physical occupation, but gives the government the power — under a permitting system — to grant exceptions, the permitting system is much different than under a statute that merely regulates use. The validity of a statute that regulates use turns on whether it leaves the property owner with a viable economic use. The question is one of degree. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986). The permit process determines the extent to which the owner's economic interest is impaired. *Id.* These concerns are not present with a law that authorizes a permanent physical occupation. *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1281-82 n.28 (1986), *rehearing denied and suggestion for rehearing en banc rejected*, 833 F.2d

1282 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988). Where a law authorizes a permanent physical occupation, it is no answer to say that a permit process might leave an owner with a viable economic use, since physical occupation, not economic impairment, invokes the owner's constitutional rights. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Contrary to the First Circuit's analysis that "[g]iven the availability of such a permit system . . . the mere enactment of the Ordinance cannot constitute a taking in the fifth amendment sense" (p. A-9, *infra*), an ordinance that subjects the enjoyment of constitutional rights to a permit process can itself be unconstitutional. See, e.g., *City of Chicago* v. *Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77, 89 (1958) (statute prohibiting carrier from transporting certain passengers and baggage absent license from government agency held invalid, since government had no power to subject plaintiff to licensing requirement; plaintiff not required to apply for license before obtaining declaration of statute's invalidity). Where a municipality cannot lawfully pass an ordinance that takes away protected rights, the municipality should not be permitted to achieve the same end result by adopting legislation that withdraws the rights ab initio and creates an administrative agency that, in its sole discretion, will determine whether and to whom to give back those rights.[8] *Id.* See *Moore* v. *City of East Cleveland*, 431 U.S. 494, 512 (1977) (concurring opinion) (existence of variance procedure is irrelevant to constitutionality of ordinance since municipality is constitutionally powerless to abridge protected rights).

The First Circuit's analysis also forecloses property owners from substantively challenging the Ordinance as applied. Having concluded the Ordinance is constitutional on its face because it does not categorically foreclose viable economic

[8] The permit procedure in this case no more saves the Ordinance from being facially invalid than would a permit procedure in a statute that, say, withdraws the right to pray except upon the issuance of a worship permit.

uses, the First Circuit has left it that affected property owners cannot establish a constitutional violation unless they apply for a permit, the permit is denied, and the rents allowed by the Rent Control Board leave the owner with no viable economic use (p. A-9, *infra*). This would require a showing that the mandated rent level is confiscatory. *Cf. Federal Communications Commission* v. *Florida Power Commission*, 480 U.S. 245, 253 (1987) (so long as government-established rate is not confiscatory, Fifth Amendment does not bar its imposition). But since the only issue the First Circuit has left open after a permit denial is the constitutional adequacy of the controlled rent level, the First Circuit's ruling — that property owners must unsuccessfully apply for removal permits before challenging the Removal Ordinance as applied — gives owners only a false hope of ever being able to invoke the Constitution to regain their rights to exclude others.[9]

In this case, tenants are authorized by the Ordinance to occupy an owner's property permanently. Under the Ordinance, the municipality has no obligation ever to issue a removal permit.[10] Absent compensation for the deprivation of the right to exclude tenants[11] — and no provision for such is in the Ordinance — Cambridge may not constitutionally mandate tenant occupancy, whether by statute, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or by permit. *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987).

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[9] Since the imposition of a confiscatory rent level is an unconstitutional taking even where property owners are not forced into tenancy relationships, *Federal Communications Commission* v. *Florida Power Commission*, 480 U.S. 245, 253 (1987), nothing is gained under the First Circuit's analysis by requiring property owners to apply unsuccessfully for permits first.

[10] The fact that a "governmental taking can always be undone if the government so chooses . . . has never defeated a taking claim." *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986).

[11] Respondents argued below that petitioners' right to collect controlled below-market rents is just compensation for the rights extinguished by the Ordinance. But rental payments merely compensate for the use of the property during the period of the occupation, not for the extinguishment of the right to exclude others and devote the property to another use.

B. *The First Circuit's Decision That The Ordinance Does Not Violate The Due Process Clause Also Conflicts With Decisions Of This Court*

Equally in conflict with the decision below is *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 540-44 (1923). In *Charles Wolff*, this court held that, with one exception not present here, a government may not require a business to continue in operation against the owner's will. The statute in that case compelled owners of food supply businesses to pay wages at mandated levels, while the owner's right to discontinue business existed only if an arm of government — created by the statute — gave permission. *Id.* at 534. In analyzing the statute's constitutionality, this Court distinguished (a) businesses "which are carried on under the authority of a public grant of privileges" such as "railroads, other common carriers and public utilities," from (b) businesses "which, though not public in their inception, may be fairly said to have risen to be such, and have become subject in consequence to some governmental regulation."[12] *Id.* at 535. As to the former category, the acceptance of the public grant of privileges imported an obligation to continue the business, except where operation is impossible without continuous loss. *Id.* at 543. As to the latter category, this Court said that the owner "may stop at will, whether the business be losing or profitable." *Id.*

> To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. . . . 'When . . . one devotes his property to a use in which the

[12] Among the cases involving examples of this latter type of business, the Court cited *Block* v. *Hirsh*, 256 U.S. 135 (1921), which dealt with residential rental property. See *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522, 535-36 (1923).

> public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.'*
>
> These words refute the view that public regulation in such cases can secure continuity of a business against the owner.

Id. at 539, 540-41 (emphasis in original), *citing Munn* v. *Illinois*, 94 U.S. 113, 126 (1877).

In *Charles Wolff*, the statute's purpose was to ensure the "continuity of food, clothing, and fuel supply," which the legislature had declared "to be necessary for the public peace, health, and general welfare." 262 U.S. at 540. This Court nonetheless invalidated the statute because it deprived owners of their property without due process in violation of the Fourteenth Amendment. *Id.* at 544. Here, the Removal Ordinance — dealing with a perceived need to ensure a supply of low-cost rent-controlled housing — stands on no higher ground.

Indeed, until the decision below, the law of the First Circuit barred the government from forcing owners to keep their property in the rental market, even in the face of a perceived need to preserve the stock of rental properties. In *Rivera* v. *R. Cobian Chinea*, 181 F.2d 974 (1st Cir. 1950), the First Circuit invalidated a law like the one here that prevented an owner from withdrawing property from the rental market. The law's stated purpose was to control rents in light of a public emergency arising from an inadequate supply of rental properties. *Id.* at 976. The First Circuit held in *Rivera:*

> When . . . the legislature sought to prohibit a landlord who in good faith desires to withdraw his property from the rental market in order to devote it to his own personal

> use it went beyond the bounds of the police power and adopted an expedient which did not have any reasonable relation to the establishment and maintenance of rent ceilings which it was the object of the Reasonable Rents Act to accomplish. . . . Such legislative prohibition would appear to be so arbitrary in relation to the object sought to be attained by the act as to amount to a deprivation of the landlord's property without due process of law.

Id. at 978. In the decision below, the First Circuit overruled *Rivera*, saying "time has passed it by" (p. A-27, *infra*).

To reach this result, the First Circuit employed a new means/ends test under the Due Process Clause. The First Circuit "ask[ed] only whether a *conceivable* rational relationship exist[ed] between the . . . ordinance and legitimate governmental ends" (p. A-26, *infra*) (emphasis by the court). In so asking, the Court effectively limited its inquiry on rationality to whether the nexus between the means and ends is rational, not whether the means themselves are rational. If the ends are legitimate, and the means chosen (in this case, the Ordinance's restrictions) are conceivably and rationally capable of achieving those ends, then in the First Circuit the ends justify the means. Under this test, the First Circuit held the Ordinance valid under the Due Process Clause, finding a conceivable rational relationship between limitations on removal of housing from the rental market and the Ordinance's stated goal of providing an adequate supply of rental housing (p. A-26-27, *infra*).

But this Court has applied a more stringent test for abridgement of property rights, requiring that the abridgement "*substantial[ly]* advanc[e]" legitimate state interests. *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 841 (1987) (emphasis in original). This Court has also required that the means themselves be rational, reasonable, and not arbitrary. *Nectow* v. *City of Cambridge*, 277 U.S. 183, 187 (1928) (ordinance

must have foundation in reason and not be arbitrary or irrational exercise of power).[13] Assuming that providing low cost housing is a legitimate governmental end, it does not follow that forcing private property owners to furnish such housing against their will is rational, reasonable, and non-arbitrary. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) (it is not plain that a man's misfortunes or necessities justify shifting the damages to his neighbor's shoulders).

Seldom will legislation not bear a conceivable rational relationship to the ends sought to be achieved. Indeed, the extinguishment of liberty or property rights would often assist the government in achieving legitimate ends. The First Circuit's means/ends test is not a good or correct test. It gives the government substantial and undesirable power to conscript private property and citizens into performing the government's work.

C. *The Decision Below Raises Issues Of Paramount Constitutional Importance In An Area That Has Generated Substantial Confusion And Inconsistency Among Circuit And State High Courts*

The property rights at issue are among the most important in the constitutional spectrum. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights...." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

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[13] The First Circuit's exclusive focus on the relationship between the means and the ends pits the First Circuit against the Eighth and Eleventh Circuits, both of which have held that the Due Process Clause requires that the means themselves not be arbitrary or discriminatory. *Whitney* v. *Heckler*, 780 F.2d 963, 971 (11th Cir. 1986); *Minnesota Association of Health Care Facilities, Inc.* v. *Minnesota Department of Public Welfare*, 742 F.2d 442, 447 (8th Cir. 1984).

If Cambridge's tactics are constitutional, then the decision below heralds a revolutionary approach to social legislation. It had commonly been regarded that if the government wanted to devote private property to a public purpose, it had to take the property and pay for it. See *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 842 (1987) (if government wants an easement over petitioner's property, it must take it and pay for it); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979) (the right to exclude is so fundamental a property right that the government cannot take it without compensation). The decision below, however, tells governments that, if they identify a need they cannot fulfill with existing government resources, they may compel property owners to fulfill that need against their will, without having to compensate them.

In the housing area, governments have historically proceeded on the basis that, if a desirable amount of low-cost housing was not being produced by the private sector, the government would either create such housing itself or offer private property owners sufficient incentives to create such housing. The federal government, for example, has devised numerous programs — involving, among other things, governmental subsidies and governmental mortgage insurance — to induce private property owners to create, and lenders to finance, affordable housing for low-income, moderate-income, handicapped, and elderly persons.

The decision below, however, gives local governments a new tool, one that costs the government only the costs of administration and is draconian in its effect on property owners. The government need merely adopt legislation that forces property owners to rent their properties to tenants at below-market rents, and that prohibits them, under threat of criminal prosecution, from doing anything else with their property. The government need not compensate the owner for the extinguishment of the right to exclude others and devote the property to another use.

If such legislation is constitutional, then the power of government to socialize private property has reached new heights. For example, if the government perceives that food prices are too high, the First Circuit's reasoning would enable the government to mandate that farmers sell their cattle at controlled prices, and that farmers be prohibited from devoting their land to any use other than cattle production. If the government believes that highway construction needs stimulation, the reasoning of the Court below would enable the government to mandate that owners of quarries lease their properties to producers of aggregate or to road construction contractors at controlled rents, and that such owners be prohibited from devoting their land to any other use. If the government decides that health care costs are too high, it could mandate that owners of medical office buildings lease space to hospitals at controlled rents, and that such owners never put their properties to another use. The examples that could be given are nearly limitless. The precedent established by the decision thus has alarming implications not only for owners of residential rental property, but also for owners of the many types of properties the government might see fit to enlist in its social agenda.

The substantive issues in this case should be decided by the Supreme Court. Given the importance of the rights at stake, and the complexity of the constitutional analysis required to resolve these issues, lower courts and litigants would be substantially aided by this Court's review. The current state of the law on takings has prompted commentary "that it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray." Peterson, *The Takings Clause: In Search Of Underlying Principles: Part I- A Critique Of Current Takings Clause Doctrine*, 77 Calif. L. Rev. 1299, 1304 (1989). See also *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1278 (9th Cir. 1986) (noting "the Supreme Court's own unwillingness to provide hard and fast rules in this sensitive

area"). Accordingly, the decision below — unless reviewed by this Court — stands a high likelihood of leading other Circuits likewise to misapply the law.

The considerations favoring review are buttressed by the fact that, since *Loretto* was decided, conflict has developed over the constitutionality of mandatory rental statutes. For example, in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the Ninth Circuit held unconstitutional a Santa Barbara ordinance that required mobile park operators to offer tenants leases of unlimited duration, at controlled rents, terminable at will by the tenants, but by the landlord only for cause. *Id.* at 1273, 1277. In addition, the ordinance "require[d] that a mobile home park owner obtain a permit to convert a park to another use." *Id.* at 1278 n.18. Crediting Justice Rehnquist's dissent in *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), and applying the principles in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Ninth Circuit panel held that the ordinance authorized a permanent physical occupation by tenants, for which compensation was required. *Id.* at 1275-77. Three Ninth Circuit justices dissented from the denial of a request for en banc review. Noting that the "case is important," *id.* at 1284, the dissenting justices, like the First Circuit panel in this case, viewed the ordinance as economic regulation only, and rejected the idea that the ordinance authorized a permanent physical occupation.

The decision below also conflicts with *Seawall Associates* v. *City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, *cert. denied*, 110 S.Ct. 500 (1989), in which the New York Court of Appeals held unconstitutional — under both the Just Compensation Clause (applying *Loretto*) and the Due Process Clause — an ordinance that required owners of single room occupancy buildings to rent to bona fide tenants and that prevented such owners from devoting their properties to any

other use, absent an exemption that was available for purchase.[14] 74 N.Y.2d at 101-106, 544 N.Y.S.2d at 546-548.

> Although the Supreme Court has not passed on the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a per se physical taking, we believe that it would. Indeed, it is difficult to see how such forced occupancy of one's property could not do so. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far more offensive and invasive than the easements in *Kaiser Aetna* or *Nollan* or the installation of the CATV equipment in *Loretto*.

74 N.Y.2d at 104, 544 N.Y.S.2d at 547.

Although the results in *Hall* and *Seawall Associates* conflict with the result in this case, the courts have appeared to add new components to the permanent-physical-occupation rule, inconsistent with this Court's precedents, thus arguing even more for granting certiorari here to enable this Court to provide much needed clarification. To reconcile *Loretto* with, among other things, this Court's dismissal of *Fresh Pond* and the Third Circuit's decision in *Troy Ltd.* v. *Renna*, 727 F.2d 287 (3d Cir. 1984) (upholding restrictions on evictions of elderly tenants from apartments converted to condominiums), the Ninth Circuit noted that, under the Santa Barbara ordinance, tenants could sell their interest to third parties. *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1278-79 (9th Cir. 1986). The Ninth Circuit viewed this factor as "crucial," because it gave tenants "practically all other rights in the property they occupy." *Id.* at 1279, 1280.

But the Ninth Circuit's distinction materially departs from *Loretto* and *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). In *Loretto*, the permanent-physical-

[14] The Ordinance in the instant case may be more restrictive because there are no circumstances that can compel the issuance of a removal permit.

occupation rule turned only on the government authorizing a third party's naked possession. It did not depend on whether the third party also had a right to sell its possessory interest. Similarly, in *Nollan*, the members of the public whom the government had granted a mere right of passage over Mr. and Mrs. Nollan's beachfront had nothing to sell.

In fact, the New York Court of Appeals in *Seawall Associates* rejected the idea that a permanent physical occupation turned on whether tenants were granted rights to transfer their possessory interest. *Seawall Associates* v. *City of New York*, 74 N.Y.2d 92, 105 n.4, 544 N.Y.S.2d 542, 547 n.4 (1989). But the *Seawall Associates* Court drew a distinction between laws requiring landlords to suffer the presence of new tenants, and laws requiring landlords to suffer the presence of current tenants, limiting its holding to the former situation, 74 N.Y.2d at 112 n.11, 544 N.Y.S.2d at 551-52 n.11, although the rationale of the opinion would equally apply to the latter.[15] The distinction seems artificial in that the Fifth Amendment is triggered by the deprivation of the right to exclude, and the adoption of a law protecting the possession of existing tenants takes away the right to exclude them. See *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting) (extinguishment of power to exclude results in "transfer of control over the [owner's] reversionary interest").

There is thus a strong need for clearer guidance from the Supreme Court as to the government's authority to burden landowners with tenants against the owner's will. This case offers the opportunity to provide that much-needed guidance, establish uniformity, and resolve this important issue.

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[15] The Ordinance in the instant case requires petitioners to suffer the presence of both existing tenants and new tenants.

II. Certiorari Should be Granted to Decide Whether a Plaintiff Must Sue for Damages in State Court Before Obtaining a Federal Declaratory Judgment That an Ordinance Unconstitutionally Takes Property Without Just Compensation, Where Every State Court Decision on Point Has Held That Invalidation, Not Damages, is the Only Remedy for Legislation That Takes Property

In addition to the above issues of substantive law, this case presents two important procedural questions concerning when a plaintiff must sue for damages in state court before suing in federal court under the Just Compensation Clause. First, is a prior suit for damages in state court necessary where the only relief sought in federal court is a declaratory judgment? Second, is a prior suit for damages in state court necessary where every state court decision on point has held that invalidation, not damages, is the only remedy for legislation that takes property?

Previously, this Court had held, in a federal suit for damages, that if state law has an adequate and certain procedure for obtaining just compensation, the plaintiff must first resort to the state law procedure. *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). The First Circuit applied *Williamson*'s prior resort rule to a federal action for declaratory relief (p. A-22-23, *infra*), thus eviscerating an essential purpose of the federal Declaratory Judgment Act, 28 U.S.C. § 2201, discussed below. Moreover, substantial caselaw shows that Massachusetts does not provide a damages remedy for takings that arise by legislative enactment. The First Circuit nonetheless required that petitioners first sue for damages in state court, holding that such lawsuits are necessary where it is "unclear" whether state law provides "the 'certain and adequate' relief that the *Williamson* Court contemplated" (p. A-25-26, *infra*).

This Court has primary responsibility for the proper functioning of the federal judiciary, including matters of jurisdiction, practice, and procedure. By making litigants first sue for damages in state court when only declaratory relief is sought, and where state law does not provide a certain damages remedy, the First Circuit has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers and to make desirable a ruling by this Court.

A. *A Prior Resort Rule Should Not Apply To Declaratory Judgment Actions*

In *Williamson*, this Court granted certiorari to decide whether governments "*must pay money damages* to a landowner whose property allegedly has been 'taken' temporarily by the application of governmental regulations." 473 U.S. at 185 (emphasis added). *Williamson* was a federal suit in which the plaintiff sought damages from the government, claiming certain zoning laws constituted a taking. *Id.* at 175. Noting that Ohio had recognized an inverse condemnation damages remedy for the type of taking at issue, *id.* at 196, this Court concluded that the lawsuit — insofar as it was based on the Just Compensation Clause — was premature because the landowner had not first exhausted the state law inverse condemnation remedy. *Id.* at 194-95.

Relying on *Williamson*, the First Circuit held that, "in advance of resort to [state compensation] procedure[s]," federal declaratory relief is premature (p. A-23, *infra*). This holding overlooks a crucial distinction between suits for damages and suits for declaratory relief. Suits for damages are intended to recover compensation for violations of rights that result in loss. If one seeks damages in federal court before invoking remedies that state law has provided for obtaining just compensation, then there has not yet been a violation of the constitutional obligation to pay for property taken that would support the award of damages in federal court.

By contrast, suits for declaratory relief are intended, among other things, to resolve disputes before reaching the stage where one's entitlement to damages ripens. 10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* §2751 at 569 (1983). Thus, the fact that state law might provide a damages remedy is not supposed to bar federal declaratory relief, Fed. R. Civ. P. 57 (existence of another adequate remedy does not preclude declaratory relief in cases where it is appropriate), especially since federal courts have a virtual unflagging obligation to exercise the jursidiction granted them. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 15 (1983). All that is required to support a complaint for declaratory relief is a "case of actual controversy." 28 U.S.C. §2201 (a).

An actual controversy exists — sufficient to warrant declaratory relief — when the government takes property for which compensation is required even though a federal suit for damages might be premature. In *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987), this Court recognized the benefit of a declaration as to the validity of a law under the Takings Clause. Noting that the Just Compensation Clause is a limitation on the flexibility and freedom of the government, this Court said that "a government body may acquiesce in a judicial declaration that one of its ordinances has affected an unconstitutional taking of property." *Id.* at 317. Such a declaration would require the government to correct the situation, by — at its option — abandoning the intrusion, discontinuing the regulation, or taking the property by eminent domain. *Id.* at 317, 321. Thus, the government would have to decide "whether the expected benefits from the restriction are worth the cost of the required compensation." *Pamel Corp.* v. *Puerto Rico Highway Auth.*, 621 F.2d 33, 36 (1st Cir. 1980).[16] This fully accords

[16] Until the decision below, the First Circuit had permitted declaratory relief under the Just Compensation Clause. *Pamel Corp.* v. *Puerto Rico Highway Auth.*, 621 F.2d 33, 35-36 (1st Cir. 1980). The First Circuit had

with how this Court has regarded declaratory judgments:

> A favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear.... The persuasive force of the court's opinion and judgment may lead state prosecutors, courts, and legislators to reconsider their respective responsibilities toward the statute. Enforcement policies or judicial construction may be changed, or the legislature may repeal the statute and start anew.

Steffel v. *Thompson*, 415 U.S. 452, 469, 470 (1974).

The First Circuit's application of the prior resort rule raises important issues concerning the relationship between the federal court, as the chief guardian of constitutional rights, *id.* at 473, and local governments, which, when adopting a law to implement a program, weigh the costs and benefits on the assumption compensation will not be required.[17] *Agins* v. *City of Tiburon*, 24 Cal. 3d 266, 276, 157 Cal. Rptr. 372, 377, 598 P.2d 25, 30 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). By making a landowner whose property is taken by excessive legislation sue for damages when the landowner would be content with the less coercive remedy of declaratory relief, the First Circuit is needlessly subjecting local governments to unanticipated and potentially major financial liabilities that

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preferred to determine whether a particular restriction was one the government could impose without paying for it, and, if not, letting the government decide whether to take the property by eminent domain. *Id.* at 35-36. In the decision below, however, the First Circuit repudiated *Pamel* on the ground that "whatever comfort...[it] once held for the [petitioners] ...has evaporated in light of [*Williamson*]" (p. A-22, *infra*).

[17] Respondents did not contemplate that the adoption of the Ordinance or the denial of removal permits would require them to pay compensation, for the Ordinance contemplates that eminent domain would be exercised only if the Ordinance were violated. Ord. 966 § 1(f).

were not considered when the law was adopted, and that could be avoided simply by declaring the rights of the parties.

Declaratory relief is a time-honored remedy for persons subject to legislation or other restrictions that take property without providing just compensation. See, e.g., *Hodel* v. *Irving*, 481 U.S. 704 (1987), *affirming Irving* v. *Clark*, 758 F.2d 1260 (8th Cir. 1985) (declaring a federal statute unconstitutional that took away right to bequeath certain property), *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987) (invalidating condition on permit that required plaintiff to dedicate public easement over private land); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) (invalidating law that took away right to mine coal). It is a legislative function to decide whether tax dollars should be spent to take property rights. See *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987) (decision to exercise eminent domain is legislative function). By mandating prior resort to state inverse condemnation damages remedies when damages are not sought in federal court, the First Circuit conflicted with this Court's pronouncement in *First English* that it did not "permit a court, at the behest of a private person, to require the . . . Government to exercise the power of eminent domain . . . ." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 321 (1987).

The Declaratory Judgment Act was also intended to afford one the opportunity for a federal court to determine the constitutionality of a state statute carrying criminal penalties, without having to violate the statute and risk the penalty. *Steffel* v. *Thompson*, 415 U.S. 452, 466-68 & n.18 (1974). If a criminal statute, such as the Ordinance, takes property without providing just compensation, and landowners desire to exercise the property rights that the statute purports to take away, a declaratory judgment can provide the relief Congress

intended.[18] A rule sending landowners first to state court to sue for damages unnecessarily impairs the vindication of those rights.

B. *A Prior Resort Rule Should Not Apply Where State Courts Have Never Allowed The Recovery Of Damages For Legislation That Takes Property*

The First Circuit mandated prior resort to state damages remedies when Massachusetts courts have never held such remedies to exist for takings that occur by legislative action. In *Williamson*, however, this Court's decision was premised on the observation that the Ohio courts had already determined that such a remedy was available for "restrictive zoning laws or development regulations." *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 196 (1985).

The First Circuit stated its belief — but shied away from holding — that the Massachusetts inverse condemnation statute was available for takings by legislative enactment (p. A-25, *infra*). But the only Massachusetts decisions on point hold that where legislation takes property without itself providing for compensation, the property owner may sue for a declaration that the legislation is void, but not sue for damages. *Callender* v. *Marsh*, 18 Mass. (1 Pick) 417, 430-31 (1823) (where by legislative act the land of any citizen should be taken without providing any means to indemnify the owner, "no action may be maintained against the public for damages, [and] the only way to secure the party in his constitutional rights would be to declare void the public approp-

[18] Since a declaratory relief action may be brought if a case of actual controversy exists, it is difficult to understand the First Circuit's ruling that the statute of limitations could bar a suit seeking declaratory relief that a statute is unconstitutional as-applied. Because petitioners are presently subject to the Ordinance and would like to engage in the conduct prohibited by the Ordinance without risking criminal penalties, there is a live case of actual controversy for which no statute of limitations should apply.

riation"); *Connecticut River R.R.* v. *County Commissioners*, 127 Mass. 50, 52 (1879) (an act conferring power to appropriate private property must be accompanied by provisions for full compensation to the owner; if government authorizes taking of property and fails to make provision for compensation, "the act is simply void").

The First Circuit's idea that Massachusetts might have a damages remedy for excessive legislation is grounded on a possible interpretation of G.L. c. 79 § 10, which provides an inverse condemnation damages remedy for takings that occur by other than a formal vote of a city council (p. A-24, *infra*).[19] But after the adoption of this statute in 1918, the Massachusetts Supreme Judicial Court has continued to void — rather than allow damages for — legislative enactments that take property and that do not provide for the payment of compensation. See e.g., *Walker* v. *City of Medford*, 272 Mass. 161, 164 (1930) (where aldermen voted to take property without following statutory procedure for eminent domain, taking was invalid and complaint for damages was dismissed). *Cf. Waltham Tele-Communications* v. *O'Brien*, 403 Mass. 747, 751-52 (1989) (where legislature adopted cable access statute but failed to include provision for payment of compensation through jury trial as required by state constitution, statute was void; damages remedy under G.L. c. 79 was not available).

The reasoning is rooted in the purpose of the eminent domain statute. Massachusetts enacted G.L. c. 79 — a comprehensive eminent domain statute of which § 10 is only a part — to establish uniform procedures for the taking of real

[19] It is petitioners' position that the inverse condemnation remedy under G.L. c.79, § 10 is available for a taking resulting from executive branch conduct, such as the building of a dam that floods one's farm, the building of a highway that prevents access to one's business, the construction of an incinerator that smokes out one's property, and the like. See examples cited in *Cayon* v. *City of Chicopee*, 360 Mass. 606, 610 (1971).

estate and for providing compensation for such takings. *Walker* v. *City of Medford*, 272 Mass. 161, 163 (1930). The statute's dominant purpose is to protect taxpayers from the expenditure of public funds unless those entrusted with such expenditures comply with the statute and the safeguards it provides. *Breckwood Real Estate Co.* v. *City of Springfield*, 258 Mass. 111, 114 (1927). Since public appropriation of private property against the owner's will is one of the highest powers of government, there must be strict compliance with the statute by which its exercise is regulated. *Walker* v. *City of Medford*, 272 Mass. 161, 164 (1930). It would thus defeat the purpose of G.L. c. 79 if a city council — by a vote not in conformity with statutory eminent domain procedures — could adopt legislation that causes a taking and thereby expose taxpayers to the loss of public funds. Accordingly, invalidation, not damages, is the only remedy Massachusetts has recognized when legislation results in a taking without following eminent domain procedures.

The First Circuit's holding — that prior resort is required where it is "unclear" whether state law provides "the'certain and adequate' relief that the *Williamson* Court contemplated" (p. A-25-26, *infra*) — misses the point. The Fifth Amendment requires that a "'reasonable, *certain* and adequate provision for obtaining compensation' exist at the time of the taking." *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (citation omitted) (emphasis added). Thus, prior resort, when required, is required "if a State provides an adequate procedure for obtaining just compensation." *Id.* at 195. If it is unclear that the procedure exists, then the federal court, as the guardian of federal constitutional rights, should decide, rather than avoid, the Fifth Amendment issues.

CONCLUSION

For the above reasons, this petition for certiorari should be granted.

Respectfully submitted,

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JULY 31, 1991

ADDENDUM A

United States Court of Appeals
For the First Circuit

No. 90-1907

HOWARD H. GILBERT, JR., ET AL.,
PLAINTIFFS, APPELLANTS,

v.

CITY OF CAMBRIDGE, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DOUGLAS P. WOODLOCK, *U.S. District Judge*]

Before
CAMPBELL, *Circuit Judge*,
BOWNES, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

James D. St. Clair, with whom *Hale and Dorr*, *Kenneth R. Berman*, and *Sherin and Lodgen* were on brief for appellants.
Stephen B. Deutsch, with whom *Andrew Z. Schwartz* and *Foley, Hoag & Eliot* were on brief for appellees.

May 3, 1991

SELYA, *Circuit Judge*. Attempting by heroic efforts to sail through straits left windless by recent Supreme Court prece-

dent,[1] certain property owners asked the United States District Court for the District of Massachusetts to overturn, on constitutional grounds, a rent control ordinance adopted in 1979 by the City of Cambridge (the Ordinance).[2] The district court did not allow the voyage to proceed. *Gilbert* v. *Cambridge*, 745 F.Supp. 42 (D.Mass. 1990). The property owners appeal. We affirm.

I. BACKGROUND

In reviewing a dismissal under Fed. R. Civ. P. 12(b)(6), we treat all well-pleaded factual averments as true and draw all reasonable inferences therefrom in the appellants' favor. *See Dartmouth Review* v. *Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989); *Ochoa Realty Corp.* v. *Faria*, 815 F.2d 812, 813 (1st Cir. 1987). Thus, our focus is on what was alleged in, or could be proved in connection with, the complaint as framed.

A. *The Ordinance.*

Although Cambridge has experienced some form of rent control for over two decades, there have been changes and revisions in the particulars of the system. The City's present scheme was enacted in 1976, pursuant to powers granted under Chapter 36 of the Massachusetts Acts of 1976 (the Act). About three years later, the city council passed the Ordinance, thereby enlarging the 1976 law. Aware that a trend toward

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[1] *See, e.g., Pennell* v. *San Jose*, 485 U.S. 1 (1988); *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340 (1986); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985).

[2] The Ordinance effectively imposed a series of restrictions on the conversion of rental units to condominiums and cooperatives. The removal restrictions, which were originally codified as Ordinance 926 and subsequently recodified, with amendments, as Ordinance 966, have recently been blended into Chapter 8.44 of the Code of the City of Cambridge (1990). All references to the Ordinance will be the latest codification.

condominium conversion had been depleting scarce housing stock and exacerbating an already existing shortage of rental housing, the council opted to restrict the ready removal of residential units from the rental market. As stated in the Ordinance's preface:

> A serious public emergency continues to exist in the City with respect to the housing of a substantial number of its citizens.... The emergency has worsened since 1976 because of the removal of a substantial number of rental units from the market, by condominium conversion, demolition, and other causes. As a result, more than two thousand or over ten percent of the controlled rental units in the city have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent. In order to carry out the purposes of the Act, and to continue to provide a sufficient supply of decent, affordable rental housing accommodations especially for families of low and moderate income and for elderly people on fixed incomes, it is necessary ... to regulate the removal of controlled rental units from the market.

Cambridge City Code § 8.44.010.

The Ordinance applies to all housing units offered for rent prior to August 13, 1979. It prohibits an owner from "removing" any such unit from the rental market without first obtaining a permit from the Rent Control Board (the Board). As defined by the Ordinance, "removal from the market" includes, *inter alia*, the conversion of a "controlled rental unit" into a cooperative or a condominium. Cambridge City Code § 8.44.020(D).[3] The Ordinance establishes three overlapping criteria which the Board is to consider in deciding whether or

[3] No permit is needed for the conversion of a rental unit if it is to be occupied by an owner who is the current tenant, who has continuously occupied the unit as a tenant since before August 10, 1979, and who intends in good faith to occupy it indefinitely in the future. *See* Cambridge City Code § 8.44.020(D)(1).

not to grant a removal permit: (1) the effect of withdrawal in terms of the benefits to persons within the class which the rent control scheme sought to protect; (2) the hardships imposed on tenants of the affected units (and any mitigating provisions stipulated by the permit-seeker); and (3) any aggravation of the rental housing shortage (especially for the elderly, families of low-to-moderate income, and people on fixed incomes) that might result from the proposed change of use. *Id.* at § 8.44.050. The Ordinance imposes fines for withdrawing controlled rental units from the rental market in derogation of the permit process and, if violations become flagrant, authorizes the City to take the offending unit by eminent domain. *Id.* at § 8.44.090.

Applicable state law also contains criminal penalties for the willful withdrawal of a housing unit from the rental market without a removal permit, Act § 12(c); *see generally Commonwealth* v. *Kapsalis*, 26 Mass. App. Ct. 448, 450, *rev. denied*, 403 Mass. 1105 (1988), and provides for judicial review of decisions to grant or deny removal permits. Act § 10. Withal, landlords retain a statutory entitlement to derive a "fair net operating income" from their controlled rental units. Act § 7(a).

B. *The Plaintiffs.*

There are, in essence, two groups of appellants: the Southview plaintiffs and the Blevins plaintiffs.

1. *The Southview Plaintiffs.* This group comprises Southview Cooperative Housing Corporation (SCHC), the record owner of a residential building consisting of about 100 rental units, and eleven SCHC shareholders. In 1979, shortly before the Ordinance was adopted, the Southview plaintiffs took preliminary steps toward converting their building to a condominium. The Ordinance became effective before any sales were consummated, thereby subjecting the units to the permit process. In January 1980, Southview residents applied for

forty-three removal permits. After holding a hearing, the Board denied the applications in April of that year.

Eschewing judicial review of the Board's decision, the owners proceeded to form SCHC and to convert the building into a cooperative. They intended to market the individual residences not as rental units, but as cooperative apartments, on the theory that the Ordinance did not subject cooperatives to the permit requirements. This plan was soon stymied when the Board adopted an interpretive regulation declaring cooperative conversions to be covered by the Ordinance. An attempt to have the state courts rule that the Ordinance did not apply to cooperatives was unsuccessful. *Southview Co-operative Housing Corp.* v. *Rent Control Board*, 16 Mass. App. Ct. 1102 (1983). The City subsequently amended the Ordinance to prohibit, *in haec verba*, the conversion of rental units to cooperative ownership without first obtaining removal permits.

In November 1980, the Southview plaintiffs again applied for permits, this time seeking to withdraw forty-seven rental units from the housing market. After a hearing, the Board again demurred. The plaintiffs did not pursue judicial review of the Board's action.

2. *The Blevins Plaintiffs.* This group comprises two trusts which together own four apartment buildings in Cambridge, aggregating more than 170 rental units.[4] In 1981, Charles Blevins formed a pair of condominium associations, intending to convert two of the properties into condominium aggregates and market the units. The Ordinance required that Blevins obtain permits to implement this plan. He never tried to do so —

[4] We have no need to differentiate between the trusts. When this suit began, Charles Blevins was the trustee of both trusts. After Blevins' death, the successor trustees, Benjamin Butcher, Donald B. Zinn, and Jonathan Keyes, were duly substituted as plaintiffs pursuant to Fed. R. Civ. P. 25(a). For the sake of clarity and to facilitate reference, we shall refer to these plaintiffs as "the Blevins plaintiffs," "the trustees," or simply "Blevins."

the trustees allege that such an attempt would have been futile — and the conversion plan was shelved.[5]

II. PROCEEDINGS BELOW

The plaintiffs brought this suit on May 27, 1988. Invoking 42 U.S.C. § 1983, they sought to have the Ordinance declared unconstitutional, both on its face and as applied. In the plaintiffs' view, the Ordinance constituted an impermissible taking of property without due process or just compensation (count 1) and a violation of the Equal Protection Clause (count 2). The plaintiffs also charged that the Ordinance abridged rights secured by the state constitution and claimed, in count 3, that the Board had omitted certain studies required under Cambridge City Code § 8.44.030 anent the number of available rental units. The defendants moved to dismiss for failure to state an actionable claim. Following oral argument and plethoric briefing, the district court granted the motion in its entirety. *Gilbert*, 745 F.Supp. 42.

The court held in substance that all claims of facial invalidity, together with the as-applied claims of the Southview plaintiffs, were barred by the expiration of a three-year limitation period. *Id.* at 45-49. The as-applied claims of the Blevins plaintiffs were dismissed as unripe. *Id.* at 49-50. As an alternative basis for dismissal, the court wrote that it would in any event decline to hear the case in its present posture because it viewed a federal declaratory judgment action as an inappropriate vehicle for resolving claims asserted under the Takings Clause of the federal Constitution. *Id.* at 50-56. In part, the court reasoned that no constitutional violation could be demonstrated unless and until the plaintiffs had utilized the inverse condemnation procedure described in Mass. Gen. L. ch. 79, § 10, and had been denied just compensation. *Gilbert*, 745

[5] On July 24, 1981, Peter Mullane, one of Blevins' tenants, did apply for a removal permit to purchase and reside in a different apartment in the same building. The permit was granted. Mullane never exercised it.

F.Supp. at 52. Finally, the court ruled that the plaintiffs had not made out a cognizable due process claim, *id.* at 51 n.7; that count 2 of the complaint failed to state a claim upon which relief could be granted, *id.* at 51 n.8; and that prudent jurisdiction was lacking in respect to the various state-law claims, *id.* at 56 n.15.

III. THE "TAKINGS" CLAIMS

We begin by examining the plaintiffs' claims under the Takings Clause, treating the facial and as-applied challenges separately.

A. *The Facial Challenges.*

The facial challenges of the two groups of plaintiffs rest on a common foundation. In seeking a declaratory judgment that the Ordinance is unconstitutional on its face, both sets of plaintiffs must cross the threshold requirement imposed by Article III, Section 2, of the federal Constitution and show that an "actual controversy" exists.[6] *Steffel* v. *Thompson*, 415 U.S. 452, 458 (1974). To do so, the plaintiffs must demonstrate that the "mere enactment" of the Ordinance constituted a taking without just compensation in violation of the fifth amendment. *See Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295 (1981); *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980).[7] In this situation, the plaintiffs cannot cross the jurisdictional threshold.

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[6] This requirement has been expressly incorporated into the Federal Declaratory Judgment Act, which provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201.

[7] The fifth amendment is, of course, made binding upon state actors by means of the fourteenth amendment. *Agins*, 447 U.S. at 260; *Fuentes* v. *Shevin*, 407 U.S. 67, 84-86 (1972).

The Court has set forth a "fairly straightforward" test to be used in considering facial challenges of this genre: "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land. . . .'" *Hodel*, 452 U.S. at 295-96 (quoting *Agins*, 447 U.S. at 260). Applying this test to the Surface Mining Act, the Court held that its "mere enactment" could not constitute a taking because the statute (1) did not categorically prohibit surface coal mining, but provided for administrative relief in the form of variances or waivers from the statutory use restrictions, and (2) allowed property owners freedom to dedicate their coal-bearing lands to alternative uses. *Id.* at 296-97.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court refined the way in which this test relates to land use regulations containing provisions for administrative relief:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Id. at 127.

This jurisprudence could not be more directly on point, defenestrating appellants' claim that passage of the permit requirement, without more, itself infracted their constitutional rights. The Ordinance does not presume to prohibit landlords, categorically, from putting their property to the uses to which appellants aspire (e.g., condominium conversions). To the exact contrary, the Ordinance makes available a procedure that

enables landlords wishing to convert buildings from clusters of rental units to condominiums or cooperatives, to do so upon application for, and receipt of, municipal approvals. Given the availability of such a permit system and the promise implied thereby — that landlords may be granted leave to use their property as they wish — the mere enactment of the Ordinance cannot constitute a taking in the fifth amendment sense. *Accord, e.g., Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 187-90 (1985); *Southern Pacific Transp. Co.* v. *Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990); *Littlefield* v. *Afton*, 785 F.2d 596, 609 (8th Cir. 1986).

What is more, even if the permit process were, as appellants contend, an illusion, the Ordinance, on its face, preserves an economically viable property use to landlords; after all, the enabling legislation upon which the Ordinance depends explicitly provides that property owners retain an entitlement to receive a "fair net operating income" on all their rent-controlled units. Act § 7(a). We view this assurance as adequate on its face to meet the second part of the Court's test. *See Riverside*, 474 U.S. at 127 (quoted *supra* p.10); *see also United States* v. *Locke*, 471 U.S. 84, 107 (1985) ("Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed."). Thus, under the applicable caselaw, the Ordinance is safe from a facial challenge because an economically viable use of the property is preserved.

For these reasons, appellants' facial challenges to the Ordinance presented no justiciable controversy. Therefore, those challenges were properly dismissed as unripe.[8]

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[8] The district court also rested its dismissal of these claims, in part, on the existence of a perceived time bar. *Gilbert*, 745 F.Supp. at 45-46. We consider this ruling problematic. In any event, we need not reach the question and prefer to leave its resolution to another day.

B. *The As-Applied Challenge — Southview.*

It is apodictic that, where a state law or municipal ordinance contains provisions for administrative relief, an as-applied claim can only arise when a property owner has actually sought, and been denied, a permit. *See, e.g., Pennell* v. *San Jose*, 485 U.S. 1, 10 (1988); *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348-53 (1986); *Tenoco Oil Co.* v. *Department of Consumer Affairs*, 876 F.2d 1013, 1026 (1st Cir. 1989). It is only at this point that one's property is meaningfully burdened by the law, bringing an actual controversy between the owner and the government into being. Thus, the disparate situations of the plaintiff groups — the Southview plaintiffs applied for, and were denied, removal permits in 1980, while the Blevins plaintiffs never sought permits — provoke different analytic concerns. Hence, we consider the two groups' as-applied claims separately. We begin with Southview.

The limitation period applicable to a section 1983 claim is to be found in the general personal injury statute of the jurisdiction in which the claim arises. *See Owens* v. *Okure*, 488 U.S. 235, 249-50 (1989); *Wilson* v. *Garcia*, 471 U.S. 261, 276-79 (1985); *Altair Corp.* v. *Pesquera de Busquets*, 769 F.2d 30, 31 (1st Cir. 1985). In Massachusetts, Mass. Gen. L. ch. 260, § 2A fixes a three-year limitation for the commencement of tort actions and, consequently, applies to section 1983 suits. *See Doty* v. *Sewall*, 784 F.2d 1, 11 (1st Cir. 1986). The limitation period begins to run upon the invasion of the plaintiffs' interests. *See Altair*, 769 F.2d at 32; *Kadar Corp.* v. *Milbury*, 549 F.2d 230, 234-35 (1st Cir. 1977); *cf. Chardon* v. *Fernandez*, 454 U.S. 6, 8 (1981) (in discrimination case, statute of limitations begins to run when illegal act takes place, not when "the consequences of the act become painful"). A straightforward application of the rule dictates, then, that the time for bringing suit on the Southview plaintiffs' as-applied claims expired in 1983 (on the third anniversary of the denial of their permit

applications). The Southview plaintiffs seek to avoid this temporal bar in three ways.

1. *Nature of Relief Sought.* First, the Southview plaintiffs contend that the statute of limitations is inapplicable to an action cast in the declaratory judgment mold. The argument is meritless. To prevent plaintiffs from making a mockery of the statute of limitations by the simple expedient of creative labelling — styling an action as one for declaratory relief rather than for damages — courts must necessarily focus upon the substance of an asserted claim as opposed to its form. It is settled, therefore, that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitations bars the concurrent legal remedy. *See Cope* v. *Anderson*, 331 U.S. 461, 464 (1947); *Russell* v. *Todd*, 309 U.S. 280, 289 (1940).

Given this precedential guidance, we agree entirely with the Second Circuit that if "a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern." *Orangetown* v. *Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); *cf. Golemis* v. *Kirby*, 632 F.Supp. 159, 164 (D.R.I. 1985). Moreover, we see no reason why this rule should apply with less force to declaratory judgment actions in the civil rights field than to other, less volatile areas of the law. *See, e.g., Clulow* v. *Oklahoma*, 700 F.2d 1291, 1302 (10th Cir. 1983) ("civil rights claims are assertable as legal rights, enforceable in actions at law as well as in equity; hence equity's jurisdiction is concurrent, not exclusive"); *Swan* v. *Board of Higher Educ.*, 319 F.2d 56, 59-60 (2d Cir. 1963) (section 1983 action seeking declaratory relief barred by statute of limitations).

2. *Anticipating One's Defenses.* The Southview plaintiffs next claim that, as they are still under the lash of the Ordinance, it makes no sense to deny them declaratory relief since, in any future enforcement action, they would promptly raise the constitutionality of the Ordinance as a defense. We find

this idea, albeit precocious, to be equally unavailing. The temporal bar cannot be sidestepped merely by asserting that the appellants' declaratory judgment suit was brought to establish defenses against the rainy day, in the future, when the Ordinance might be enforced against them. *Cf., e.g., Natural Resources Defense Council, Inc.* v. *United States EPA*, 790 F.2d 289, 315 (3d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987) (party's demand for a promise of exemption from waste water regulations on the basis of an as-yet-hypothetical situation held to be premature). Such a smoke-and-mirrors approach would place far too much priority on theoretical possibilities at the expense of practical actualities, requiring us, in the last analysis, to treat aggressor as defender, petitioner as respondent. In effect, it would also serve to make justiciable claims which were simultaneously stale (i.e., time-barred as to the actual permit denial) and unripe (i.e., not yet mature as to any potential enforcement action). The decided cases are to the contrary. *See Mobil Oil Corp.* v. *Department of Energy*, 728 F.2d 1477, 1488 (Temp. Emerg. Ct. App. 1983) (holding that laches can be invoked against a declaratory judgment plaintiff who seeks affirmatively to challenge an agency rule to which it remains subject), *cert. denied*, 467 U.S. 1255 (1984); *see also Peter Henderson Oil Co.* v. *Port Arthur*, 806 F.2d 1273, 1275 (5th Cir. 1987) (holding that statute of limitations barred plaintiff's § 1983 suit seeking declaration that municipal drilling ordinance was unconstitutional).

We refuse to subvert the realties of the case before us simply to suit a party's convenience. The Southview plaintiffs are, indeed, plaintiffs. They have been barred from bringing a claim for damages since three years after the denial of their permit applications. Draping their claim in the raiment of the Declaratory Judgment Act, some five years after the window of opportunity framed by the statute of limitations has closed, cannot elude this time bar.

3. *Continuing Violation Theory.* Finally, the Southview plaintiffs attempt to invoke tolling on the theory that the

Board's denial of permits constituted a "continuing violation" of their constitutional rights. This approach, too, leads down a blind alley. As we have said in the Title VII context, "courts must be careful to differentiate between discriminatory acts and the ongoing injuries which are the natural, if bitter, fruit of such acts." *Jensen* v. *Frank*, 912 F.2d 517, 523 (1st Cir. 1990); *see also Mack* v. *Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 182 (1st Cir. 1989).

On the facts of this case, the Southview plaintiffs' argument obfuscates what we have termed the "critical distinction" between a continuing act and a singular act that brings continuing consequences in its roiled wake. *Altair*, 769 F.2d at 32. The single act challenged — the Board's denial of the Southview plaintiffs' permit applications — comprised a discrete event. It occurred in 1980. The statute of limitations ran uninterrupted after that denial took place. "In a § 1983 case concerning the unlawful taking of property, the statute of limitations begins to run on the date of the wrongful appropriation." *Id.* It is altogether beside any relevant point that the Southview plaintiffs continued to feel the effects of the Board's adverse decision in 1983 (when the limitation period expired) and beyond. *See Jensen*, 912 F.2d at 523. Whatever harms were suffered add up to nothing more than the predictable, albeit painful, consequences of the permit denial. Absent any showing of the kind of ongoing acts needed to foster tolling, the Southview plaintiffs cannot belatedly resurrect their as-applied claims.[9]

C. *The As-Applied Challenge — Blevins.*

Having never sought removal permits, the Blevins plaintiffs occupy an even more vulnerable position. They must over-

[9] Appellants' reliance on *Gordon* v. *Warren*, 579 F.2d 386 (6th Cir. 1978), is mislaid. *Gordon* stands for the unremarkable — and entirely dissimilar — proposition that, when a law is declared unconstitutional, the limitation period for a takings claim begins to run from the date of the statute's invalidation. *Id.* at 391. The case at hand is, obviously, cut from a different bolt of cloth.

come the strong presumption that their as-applied claims are not ripe for judicial resolution. *See, e.g., Pennell*, 485 U.S. at 10; *County of Yolo*, 477 U.S. at 348-53; *Hodel*, 452 U.S. at 296-97; *Tenoco*, 876 F.2d at 1026-27. Recognizing the formidable obstacle posed by the ripeness requirement, the Blevins plaintiffs attempt to evade it in two ways. We consider each stratagem.

1. *The Loretto Doctrine.* Appellants first assert that submitting to the permit process is not essential because the Ordinance effects a permanent physical occupation of their property, which is *per se* unconstitutional and cannot be saved from invalidity by a permit system. This asseveration invokes the specter of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court held that, since any "permanent physical occupation," however small, effectively destroys an owner's rights to possess, use, and dispose of the property in question, the fact of the occupation is itself sufficient to show that there has been a "taking" for which compensation is due. *Id.* at 432-38. Under *Loretto*, appellants tell us, resort to the permit process here is unnecessary to establish a taking in the constitutional sense.

This argument overlooks, however, that there has been no permanent physical occupation of the kind envisioned in *Loretto*. *See id.* at 437 (describing "permanent physical occupation" as "[t]he placement of a fixed structure on land or real property"). The argument likewise overlooks the *Loretto* Court's warning that its ruling was "very narrow" and not intended to "question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441. The *Loretto* Court was explicit in stating that its holding was not to be employed to challenge settled doctrine anent regulation of rental housing:

> [W]e do not agree . . . that application of the physical occupation rule will have dire consequences for the gov-

> ernment's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.

Id. at 440. Hence, *Loretto* by its own terms dispels any notion that a regulation like the Ordinance creates the sort of "permanent physical occupation" which might allow a suit to redress an allegedly unconstitutional taking without regard to the availability of a facially satisfactory permit process.[10]

2. *The Futility Exception.* This brings us to the trustees' second contention. Citing *Northern Heel Corp.* v. *Compo Indus., Inc.*, 851 F.2d 456, 461 (1st Cir. 1988), where we stated in an unrelated context that "[t]he law should not be construed idly to require parties to perform futile acts or to engage in empty rituals," the trustees contend that they should be excused from the permit process since participating in it would be an exercise in futility. Whatever the theoretical possibility that the Board might grant removal permits, the trustees say, such permits are virtually never granted, "especially in connection with any effort to occupy cooperative or condominium units or sell such units to persons who desire to occupy them." In support of this otherwise conclusory averment, the trustees mention the 1980 Southview denials, and argue that, since they "are functionally in the same position as

[10] To be sure, we do not suggest that all regulation of rental housing is outside the sweep of *Loretto*. Indeed, the *Loretto* Court itself hypothesized that the physical occupation rule might apply were "the government to requisition a certain number of apartments as permanent government offices," *Loretto*, 458 U.S. at 439 n.17. It seems patent to us, however, that an action which actually changes control over, as well as occupation and use of, the property, arguably within *Loretto*, is something very different from a regulation that restricts the conversion of rental apartments into condominiums or cooperatives, but which allows their owners to seek variances and, if variances are denied, to continue either to rent the units and receive a fair net operating income therefrom or to occupy the units.

Southview, except that they have more units," one can infer that the same result would follow. As additional evidence, they cite an affidavit, filed as part of their opposition to defendants' motion to dismiss, where it was stated, on the basis of a review of the Board's records, but without any indication as to the number of such applications previously filed, that no removal permit application "had [ever] been granted to allow a conventional conversion from apartment use to a condominium or cooperative, or to allow a unit owner or proposed unit owner to move into his or her own unit if it were already occupied by an existing tenant." An affidavit submitted by the defendants on the same issue, after an arguably more cursory review of the same records, reveals that "there has been only one (1) application to the Board for removal permits to allow the sale of the units in a rental building as condominiums since January 1, 1982."[11]

[11] These affidavits were filed with the district court several months before the motion to dismiss was heard. They were referred to by at least one side during oral argument on the motion. Yet, the district court made no reference to the affidavits and appears not to have converted the motion into one for summary judgment as allowed under Fed. R. Civ. P. 12(b) ("matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"). We need neither consider the effect, if any, of these affidavits, nor choose among the differing approaches to Rule 12(b). *Compare, e.g., Grand Union Co.* v. *Cord Meyer Development Corp.*, 735 F.2d 714, 716-17 (2d Cir. 1984) (holding that presence of affidavits automatically converts motion to dismiss to motion for summary judgment unless affidavits were explicitly "excluded from consideration" by the district court) *with, e.g., North Star Int'l* v. *Arizona Corp. Comm'n*, 720 F.2d 578, 582 (9th Cir. 1983) (holding that district court properly treated motion as motion to dismiss, despite presence of affidavits, where there was no indication of the court's reliance on outside materials and the court expressly stated that it was dismissing for failure to state a claim upon which relief could be granted); *see also Jacob* v. *Curt*, 898 F.2d 838, 839 (1st Cir. 1990) (rejecting contention that court had improperly treated motion to dismiss as motion for summary judgment where no indication of court's reliance on affidavit was made manifest). In this case, whether or not the affidavits were considered makes no difference; they are so inconclusive that, whichever approach to Rule 12(b) we might ultimately favor, the result on appeal would be unaffected.

Other courts have recognized that there is a narrow "futility exception" to the final decision requirement for takings claims which, on rare occasion, may excuse the submission of an application for a variance or other administrative relief. *See, e.g., Southern Pacific*, 922 F.2d at 504; *Eide* v. *Sarasota County*, 908 F.2d, 716, 726-27 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1073 (1991). We agree that there are circumstances in which a party, on grounds of futility, might bypass a permit process and go directly to court seeking judicial review of a law's constitutionality under the Takings Clause. Futility may be found, for example, where special circumstances exist such that a permit application is not a "viable option," *Herrington* v. *Sonoma*, 857 F.2d 567, 570 & n.2 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), or where the granting authority has dug in its heels and made it transparently clear that the permit, application or no, will not be forthcoming, *e.g., Parkview Corp.* v. *Department of Army, Corps of Engineers, Etc.*, 490 F.Supp. 1278, 1282 (E.D. Wis. 1980). In our judgment, recognizing a stringently cabined futility exception is consistent with familiar doctrine suggesting that exhaustion of administrative remedies will not ordinarily be required where the hierarchs have made it quite plain that the relief in question will be denied, *see City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24, 34 (1934); *White Mountain Apache Tribe* v. *Hodel*, 840 F.2d 675, 677 (9th Cir. 1988) ("administrative review may be futile by virtue of a preannounced decision by the final administrative decision-maker"), or where a party has been denied access to administrative remedies, *see, e.g., Christopher W.* v. *Portsmouth School Comm.*, 877 F.2d 1089, 1096-97 (1st Cir. 1989), or where there is "objective and undisputed evidence of administrative bias," *see, e.g., White Mountain Apache Tribe*, 840 F.2d at 677-78.

The futility exception is far easier to conceptualize than to define. Since obtaining a final municipal decision should be the rule, however, the burden of establishing futility must lie with the party seeking to bypass the permit procedure — and

any reasonable doubt ought to be resolved against that party. Thus, although futility can excuse a plaintiff's eschewal of a permit application, the mere possibility, or even the probability, that the responsible agency may deny the permit should not be enough to trigger the excuse. *See United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931); *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 106 (D.C. Cir. 1986). To come within the exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so).[12] *See James* v. *United States Dept. of HHS*, 824 F.2d 1132, 1138-39 (D.C. Cir. 1987) (administrative remedy futile where certainty of adverse decision exists); *Randolph-Sheppard*, 795 F.2d at 105 (similar); *see also Southern Pacific*, 922 F.2d at 504 (futility exception inapplicable unless manner of rejection of earlier application "makes it clear that no project will be approved").

Recognizing the difficulty of formulating precise guidelines for this exception, the Ninth Circuit, relying on *County of Yolo*, 477 U.S. at 352-53 n.8, has held that, at a bare minimum, "[a] property owner cannot rely on the futility exception until he or she makes at least one meaningful application" for administrative relief. *Herrington*, 857 F.2d at 569; *Kinzli* v. *Santa Cruz*, 818 F.2d 1449, 1454-55 (9th Cir.), *amended*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043 (1988); *see also Unity Ventures* v. *Lake County*, 841 F.2d 770, 775-76 (7th Cir.) (Seventh Circuit applies same rule to find due process claim unripe), *cert. denied*, 488 U.S. 891 (1988).

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[12] There may be a further facet of the futility exception, applicable where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention. *See, e.g., Browning-Ferris Indus., Inc.* v. *Alabama Dept. of Env't Mgmt.*, 799 F.2d 1473, 1477-80 (11th Cir. 1986). Such a situation clearly does not exist here; the properties are already being used in an economically viable way, the permit process is not alleged to be an elaborate or overly lengthy one, and the only perceptible "hardship" is the appellants' inability to maximize their profits.

We adopt this basic approach: the filing of one meaningful application will ordinarily be a necessary, although not alone sufficient, precondition for invoking the futility exception. It follows, therefore, that the Blevins plaintiffs, having never applied for a removal permit, cannot rely on the futility exception.[13]

Moreover, there is no way, on the basis of what has been pled here, that the trustees can evade the preclusive force of noncompliance with the "one meaningful application" requirement. It strikes us as a leap of gargantuan proportions to reason that a factfinder could, on Blevins' gossamer allegations, and in light of the detailed procedures and standards set forth for permit proceedings under the Ordinance,[14] draw an inference that it would "certainly" or "nearly certainly" have been futile for Blevins to file an application in 1988. Although we understand that, in the pleading stages, a plaintiff's burden to set out facts is relatively light, we have repeatedly warned that "minimal requirements are not tantamount to nonexistent requirements." *Gooley* v. *Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). A reviewing court "need not credit bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation," *Correa-Martinez* v. *Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990), even when such phantoms are robed by the pleader in the guise of facts. We have been particularly insistent in section 1983 cases to require

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[13] Requiring one meaningful application in a situation like this one does not run afoul of the principle that exhaustion of remedies is not ordinarily essential to the commencement of an action under 42 U.S.C. § 1983. *See Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 516 (1982). "The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." *Williamson*, 473 U.S. at 192; *accord Tenoco*, 876 F.2d at 1025. Moreover, the fifth amendment takes precedence, "requir[ing] property owners to utilize procedures for obtaining just compensation before alleging a taking in a section 1983 action." *Southern Pacific*, 922 F.2d at 503 n.4 (paraphrasing *Williamson*, 473 U.S. at 194 n.13).

[14] As these regulations were submitted as part of the complaint, they may be considered in determining a Rule 12(b)(6) motion. *See* 2A *Moore's Federal Practice* ¶ 12.07 at 12-68 (2d ed. 1990).

a fair degree of specificity — a foundation of material facts — to survive a motion to dismiss. *See Correa-Martinez*, 903 F.2d at 53; *Dewey* v. *University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982), *cert. denied*, 461 U.S. 944 (1983); *Slotnick* v. *Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978).

In this instance, appellants' didactic claim of futility, on its face, appears altogether speculative, not only because the trustees never filed even one meaningful application with the Board to convert any of their buildings to condominiums, but also because of the utter lack of other fact-dominated allegations which would serve to bring the appellants within any possible futility exception. To the extent that appellants' averments suggest that the permit process is a sham, the suggestion is a self-serving generality, counting for very little. *See Christopher W.*, 877 F.2d at 1095-96; *Association for Retarded Citizens, Inc.* v. *Teague*, 830 F.2d 158, 162 (11th Cir. 1987). Any attempt to lean on the results of Southview's efforts seems farfetched; not only are the properties different, but appellants' counsel indicated at oral argument before us that the appellants' rekindled interest in condominium conversions very likely came about "because the economic situation . . . changed" between 1980 (when the Southview applications were rejected) and 1988 (when suit was started in the district court).

In sum, the allegation of futility contained in the complaint is a matter of rank supposition. We are unable to say that the trustees have presented more than an "unsubstantiated conclusion[]" of the kind that our cases teach is inadequate to pass muster in the face of a motion to dismiss. *See Correa-Martinez*, 903 F.2d at 52; *see also Dartmouth Review*, 889 F.2d at 16 ("It is only when . . . conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for

pleading purposes."). Having never sought a removal permit, the trustees' takings claims are premature.[15]

D. *Resort to State Procedures.*

There is a further reason why the takings claims of both groups of plaintiffs are not velivolant: they have not sought compensation through the procedures Massachusetts has provided for that purpose. The fifth amendment provides in pertinent part that "private property shall not be taken for public use, without just compensation." This provision "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (hereinafter, "*First Lutheran*"). For that reason, so long as the State provides an adequate process for obtaining compensation, and resort to that process holds out some realistic promise of yielding just compensation, an owner of property has no cognizable claim against the State in respect to an alleged confiscation. *See Williamson*, 473 U.S. at 194-97; *Ochoa*, 815 F.2d at 817; *Culebras Enterprises Corp.* v. *Rios*, 813 F.2d 506, 514-15 (1st Cir. 1987). As the *Williamson* Court explained:

[15] For much the same reasons, even if the Southview plaintiffs could somehow avoid the time bar that inhibits their as-applied claims, *see supra* Part III(B), they would fare no better under the futility exception. The applications and denials were approximately eight years old when the Southview contingent opted to start suit. To be "meaningful," an application for administrative relief must be essentially complete, must realistically describe the desired use, and must be reasonably current (or, at least, if it has been pending for some time, the agency's rejection of it must be reasonably fresh). *See, e.g.*, *Kinzli*, 818 F.2d at 1455 (meaningful application requirement mandates that applicants submit at least one thorough application and not abandon it at early stage); *cf. County of Yolo*, 477 U.S. at 353 n.9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."). The Southview plaintiffs have no more basis than the Blevins plaintiffs for trumpeting the inevitability of the forecasted rejection of a permit application under present conditions.

> . . . because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson, 473 U.S. at 194 n.13.

Appellants argue that this requirement does not apply to them because they are seeking declaratory relief, not money damages. They also contend that, since Massachusetts does not provide an adequate process for obtaining just compensation in the circumstances of this case, their claims are ripe. Neither argument withstands scrutiny.

1. *Absence of Prayer for Damages.* On the first issue, appellants assert that *Williamson*, *Ochoa*, and *Culebras* all involved only money damages, whereas appellants seek none.[16] They contrast these cases with earlier cases in which we suggested that, in certain circumstances, a federal court might grant a declaratory judgment as to whether or not a taking had occurred without requiring the property owner first to exhaust state compensation procedures. *See, e.g.*, *Ortiz De Arroyo* v. *Barcelo*, 765 F.2d 275, 280 (1st Cir. 1985); *Citadel Corp.* v. *Puerto Rico Highway Auth.*, 695 F.2d 31, 34 (1st Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); *Pamel Corp.* v. *Puerto Rico Highway Auth.*, 621 F.2d 33, 35-36 (1st Cir. 1980); *see also Culebras*, 813 F.2d at 509-12. But whatever comfort these cases once held for the proposition advanced by the present appellants has evaporated in light of the Supreme Court's developing jurisprudence.

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[16] Insofar as appellants intimate that no relief apart from money damages was sought by the plaintiffs in *Williamson*, *Ochoa*, and *Culebras*, they are wrong. *See Williamson*, 473 U.S. at 183 (plaintiff awarded injunctive relief as well as damages in district court); *Ochoa*, 815 F.2d at 813 (in its complaint, plaintiff sought declaratory and injunctive relief as well as damages); *Culebras*, 813 F.2d at 508 (plaintiffs originally sought injunctive relief as well as damages).

As the district judge recognized, our underlying concern in *Pamel* and its progeny was the then-unresolved question of whether a temporary taking was compensable. *See Gilbert*, 745 F.Supp. at 53 n.10. Within months after our decision issued in *Culebras*, the Court settled that issue. *See First Lutheran*, 482 U.S. at 321 (establishing that damages are retrospectively available for the period of a temporary or regulatory taking ultimately held unconstitutional by a court of competent jurisdiction). The resolution of this previously unanswered question, coupled with the Court's unambiguous declaration that there can be "no constitutional violation" under the Takings Clause until just compensation has been denied (and that, therefore, due to the nature of the constitutional right, property owners must resort to available state compensation procedures before suing under section 1983), *Williamson*, 473 U.S. at 194 n.13, leaves no doubt that, so long as the State provides an adequate process for securing compensation, federal equitable intervention in advance of resort to that procedure is premature. *Accord Golemis*, 632 F.Supp. at 164 ("the [*Williamson*] Court's ripeness analysis would be completely neutered if its holding were applied to damage claims alone").[17]

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[17] We specifically reject appellants' suggestion that *First Lutheran*, in holding that damages were available for the entire period of an unconstitutional regulatory taking, gutted the rationale of *Williamson*. Indeed, the *First Lutheran* Court explicitly disclaimed any inconsistency between the holding there and the Court's statement in *Williamson*, 473 U.S. at 194 n.13, that "no constitutional violation occurs until just compensation has been denied." Chief Justice Rehnquist wrote for the *First Lutheran* majority:

> This statement . . . was addressed to the issue whether the constitutional claim was ripe for review and did not establish that compensation is unavailable for government activity occurring before compensation is actually denied. Though, as a matter of law, an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier, and compensation is measured from that time.

482 U.S. at 320 n.10.

2. *Adequacy of State Remedy.* This brings us to appellants' alternative argument that, even if a declaratory judgment action on a takings claim is unripe until the gauntlet of available state compensation procedures has been run, Massachusetts offers no remediation in this type of situation. The argument focuses upon the Massachusetts inverse condemnation statute, which says:

> When the real estate of any person has been taken for the public use . . . or has been entered for a public purpose, but such taking [or] entry . . . was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law . . ., and by such taking . . ., entry . . . or use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter.

Mass. Gen. L. ch. 79, § 10. The statute further provides that an aggrieved property owner may bring an action in the State's courts for an assessment of any such damages. *See id.* at § 14 ("A person entitled to an award of damages under [Chapter 79] . . . may petition for the assessment of such damages to the superior court of the county in which the property taken or injured was situated.").

Appellants contend that the language of section 10 excluding takings "effected by or in accordance with a formal vote" applies to the Ordinance (which was adopted by vote of the city council), thus barring their access to an inverse condemnation remedy. Appellees, on the other hand, insist that section 10's reference to "a formal vote" cuts in only when the condemnation of property is direct, not inverse (as in eminent domain proceedings). The district court agreed with the appellees' interpretation of the statute. As the alleged confiscation here was indirect, the court concluded that "the Massachusetts inverse condemnation procedure under § 10 provides

the plaintiffs with an adequate means of obtaining just compensation for any alleged taking." *Gilbert*, 745 F.Supp. at 52.

We believe that the district court's construction of Chapter 79 is correct.[18] We need not probe the point, however, for a plaintiff seeking to invoke the Takings Clause in a federal court without first exhausting state remedies has the burden of proving the inadequacy of those remedies. Thus, in *Culebras*, where it was unclear whether the applicable statute would furnish plaintiffs with the "certain and adequate" relief that the *Williamson* Court contemplated, we wrote:

> Lack of clarity is not unusual . . . when legal rights are still in process of definition through case-by-case adjudication. . . . Plaintiffs have certainly not proven the inadequacy of [Puerto Rico's] inverse condemnation remedy. We think they must pursue that remedy before they can maintain a federal damages claim, since, when fleshed out by the local court, that remedy could well provide the "certain and adequate" relief they seek.

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[18] In arguing for an opposite result, the appellants place paramount reliance on a pair of cable television cases which show, in their view, that an inverse condemnation remedy is inapplicable to a regulatory taking unless expressly incorporated into the underlying legislative enactment. We do not believe either that these opinions stand for such a proposition or that they can carry the cargo which the appellants load on them. The first such case, *Greater Worcester Cablevision, Inc.* v. *Carabetta Enterprises, Inc.*, 682 F.Supp. 1244 (D. Mass. 1985), neither cites to *Williamson* nor considers the impact of Mass. Gen. L. ch. 79, § 10. The second case, *Waltham Tele-Communications* v. *O'Brien*, 403 Mass. 747 (1989), arose after the Massachusetts cable television statute was amended to remedy the defect perceived in *Carabetta*, 682 F.Supp. at 1247-52, by including an administrative procedure assuring compensation for takings occasioned by cable installations. In *Waltham Tele-Communications*, the Supreme Judicial Court held that the neoteric procedure was unconstitutional because it did not provide for jury determination of just compensation as required under article 15 of the state constitution. 403 Mass. at 751-52. As the court read the statute to provide an exclusive administrative remedy, it had no occasion to consider whether section 10 (under which a jury trial is available) would otherwise have provided an adequate anodyne.

Culebras, 813 F.2d at 514-15; *see also Hudson* v. *Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) (to prevail on a takings claim, "the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate"). We apply the same standard to the appellants. Since they have fallen well short of convincing us that their situation is outside the Massachusetts inverse condemnation remedy, and since that anodyne, if applicable, would confer "certain and adequate" relief, the takings claims are unripe until the potential state remedy has been more fully pursued.

IV. OTHER CONSTITUTIONAL CLAIMS

In addition to the takings claims, appellants' complaint also asserted claims for violations of the Due Process Clause and the Equal Protection Clause. We agree with the lower court that these claims are bootless.

As we recently said in an analogous case involving a land use ordinance, a court facing a substantive due process challenge to municipal legislation of a social or economic nature "asks only whether a *conceivable* rational relationship exists between the . . . ordinance and legitimate governmental ends." *Smithfield Concerned Citizens for Fair Zoning* v. *Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990); *see also Nebbia* v. *New York*, 291 U.S. 502, 537 (1934) ("a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose"); *Baker* v. *Concord*, 916 F.2d 744, 755 (1st Cir. 1990) ("if the State's objective is legitimate and the taxonomy adopted is rationally related to achieving that objective, then the law does not transgress due process"). That barrier is easily scaled in the circumstances at bar. As *Pennell* instructs, an ordinance controlling the removal of rental units is not "arbitrary, discriminatory, or demonstrably irrelevant" to its stated — and presumptively legitimate — goal of assuring

an adequate supply of rental housing, *Pennell*, 485 U.S. at 11 (quoting *Nebbia*, 291 U.S. at 539), but instead "represents a rational attempt to accommodate the conflicting interests of protecting tenants . . . while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Id.* at 13.[19]

The appellants' equal protection claim is no more robust. The Court has stated unambiguously that laws which do not burden a suspect class or a fundamental interest will not be overturned "unless the varying treatment of differing groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *See Pennell*, 485 U.S. at 14; *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). That is to say, absent a clear showing of arbitrariness or irrationality, an equal protection challenge to a state regulation or a municipal ordinance is doomed to failure. *Baker*, 916 F.2d at 749.

Given the applicable criteria, and the fact that, at bottom, appellants' equal protection claim is but a reformulation of their substantive due process claim, count 2 of the complaint was properly dismissed. Whether or not the Ordinance has achieved its goal of assuring an adequate supply of low-cost housing, it comes well within the wide universe of acceptable legislative choices arguably designed to advance that end. No

[19] Given *Pennell's* teachings, and the nexus between substantive due process and socioeconomic legislation as charted in other recent Supreme Court opinions, *e.g.*, *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988); *Hodel* v. *Indiana*, 452 U.S. 314, 330-32 (1981), appellants' reliance of our forty-year-old holding in *Rivera* v. *R. Cobian Chinea & Co.*, 181 F.2d 974 (1st Cir. 1950) (finding that a statute prohibiting an owner from withdrawing his property from the rental market for his own use constituted a violation of due process), is misplaced. Though *Rivera* has not heretofore been expressly overruled, time has passed it by. As we said in our 1989 decision in *Tenoco*, "[f]or the last half-century, courts have upheld challenged governmental acts unless no reasonably *conceivable* set of facts could establish a rational relationship between the regulation and the government's legitimate ends." 876 F.2d at 1022 n.15. *Rivera* stands at odds with a now venerable body of due process jurisprudence and is no longer the law of this circuit.

more was exigible. *See Montalvo-Huertas* v. *Rivera-Cruz*, 885 F.2d 971, 981 (1st Cir. 1989) ("Neither the wisdom nor actual efficacy of the legislative judgment is before us."). Hence, the notion that the Ordinance, on its face, violates appellants' right to equal protection is wholly untenable.

The district court appropriately granted the motion to dismiss the due process and equal protection claims under accepted principles of rationality review.[20]

V. CONCLUSION

The primary thrust of our holding today is that appellants' takings claims are not timely. Their facial claims fail because of the existence of the removal permit procedure and the statutory assurance of a fair return on investment. Their as-applied claims fail because the Blevins plaintiffs have never utilized the permit process and the Southview plaintiffs utilized it too long ago. At any rate, all the takings claims are foreclosed because the plaintiffs have not invoked the State's inverse condemnation procedure in search of just compensation. It follows, then, that appellants' takings claims, being unripe for adjudication, were properly dismissed. *See, e.g., Tenoco*, 876 F.2d at 1029 n.23 ("A determination that a claim is not ripe deprives a court of jurisdiction; there is as yet no 'case or controversy' as required by Article III of the federal Constitution."). The due process and equal protection claims were insufficient for the reasons stated, *see supra* Part IV, and were likewise appropriately dismissed. As for the state-law claims, they fail in tandem with their federal counterparts to the extent that they are correlative. To the extent that the state-law

[20] Where, as here, due process and equal protection sorties comprise the same basic claim under two different labels, the same ripeness criteria apply to both claims. *See Eide*, 908 F.2d at 724 n.12 (listing cases). In this instance, both such claims were, of course, unripe, *see Pennell*, 485 U.S. at 11 n.5; *Williamson*, 473 U.S. at 199-200; *Eide*, 908 F.2d at 723-27; *Unity Ventures*, 841 F.2d at 775; *Herrington*, 857 F.2d at 569; *Culebras*, 813 F.2d at 515, and thus, subject to dismissal on that ground as well.

claims may be viewed as independent, those claims, including but not necessarily limited to count 3 of the complaint, were properly dismissed for want of subject matter jurisdiction under the rule of *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial . . ., the state claims should be dismissed as well."); *accord Brennan* v. *Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989).

We need go no further.[21] The plaintiffs waited nearly a decade after the Ordinance was enacted before deciding to enter the federal courts. Once they determined to do so, they were then too hasty, essaying a rush to judgment without due recourse to either the permit process or the State's inverse condemnation procedure. Having chosen not to follow the accepted routes, the plaintiffs are becalmed. They cannot now expect a federal court to nurture their claims through a trial or to be tempted by unripe fruit into a premature consideration of potentially important constitutional issues — issues which may or may not actually materialize.

Affirmed.

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[21] Having concluded that the takings claims must be dismissed for lack of jurisdiction, we need not address defendants' argument that the district court was required to abstain under the principles of comity enunciated in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). By the same token, we do not reach the district court's alternative holding that the appellants' claims should be dismissed in the proper exercise of judicial discretion. *See Gilbert*, 745 F.Supp. at 53-56.

ADDENDUM B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 88-1255-WD

HOWARD H. GILBERT, JR., ET AL.,
PLAINTIFFS,

v.

CITY OF CAMBRIDGE, ET AL.,
DEFENDANTS.

MEMORANDUM AND ORDER
August 9, 1990

WOODLOCK, District Judge

Certain Cambridge property owners perceive themselves burdened by the City's decade old restrictions on the removal of rental units from the rental market. In this declaratory judgment action they principally seek a federal court determination that the restriction scheme constitutes a "taking" of their property within the meaning of the United States Constitution. They do not seek damages — at least at this time in this court.

I find the plaintiff property owners stumble at the threshold of their action. Treated as a facial challenge to the restrictions, their claim is barred by the statute of limitations. Treated as "as applied" challenges, their claims are either barred by the statute or are not yet ripe. Consequently, I will dismiss this law suit as untimely.

My dismissal rests on broader alternative grounds as well. I decline to entertain this "state-takings" law suit in a federal declaratory judgment context when the plaintiffs have failed

to crystallize their claims through adequate and available state mechanisms for determining whether a taking without just compensation has occurred.

I

At issue is the constitutionality of those provisions of a Cambridge ordinance and the regulations promulgated thereunder which govern the ability of Cambridge landlords to remove their property from the rental housing market. Specifically, the plaintiffs challenge the requirement that any owner of a Cambridge apartment subject to rent control must obtain a permit from the Cambridge Rent Control Board prior to taking any action that would effect a removal.[1]

—A—
The Regulatory Scheme

A system of rent control has been in effect in Cambridge since 1970. *See generally* Clark, *Rent Control in Massachusetts*, 73 Mass. L. Rev. 160 (1988). In 1976, the city enacted a version of the current rent control regulatory scheme pursuant to Chapter 36 of the Massachusetts Acts of 1976.

In 1979, Cambridge adopted a municipal ordinance, the "Removal Permit Ordinance," that established a program of

[1] Count One of the Complaint alleges that the "Removal Prohibitions result in a taking of the plaintiffs' property without due process or just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Part I, Articles 1 and 10 of the Massachusetts Declaration of Rights." ¶23.

Count Two alleges that the "Removal Restrictions on their face, and as applied to the plaintiffs and to their property, result in unequal protection of the laws, in violation of the Fourteenth Amendment of the United States Constitution, and Part I, Articles 1 and 7 of the Massachusetts Declaration of Rights." ¶26.

Count Three alleges that the defendant Rent Control Board has failed to make certain studies regarding rental units as required by the local ordinance.

restricting removal of housing units from the rental market.[2] The "Declaration of Emergency" in the first section of the Removal Permit Ordinance sets forth the following justification for adoption of the measure:

> A serious public emergency continues to exist in the City of Cambridge with respect to the housing of a substantial number of its citizens, as declared by Chapter 36 of the Acts of 1976, for the reasons stated in the Act. The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market, by condominium conversion, demolition, and other causes. As a result, more than 2,000 or over 10 percent of the controlled rental units in the city have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent. In order to carry out the purposes of the Act, and to continue to provide a sufficient supply of decent, affordable rental housing accommodations especially for families of low and moderate income and for elderly people on fixed incomes, it is necessary for the Cambridge City Council, in the exercise of its powers under section 6 of the Home Rule Amendment and under section 5(c) of the Act, to regulate the removal of controlled rental housing units from the market.

The Removal Permit Ordinance applies to housing units offered for rent prior to August 13, 1979. The Ordinance prohibits the owner of such a unit from ceasing to rent it without a removal permit, but entitles the owner to a "fair net operating income" on the use of the property as rental property. Judicial review of a decision to grant or deny a removal permit is provided in the state courts.

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[2] The removal restrictions were originally contained in Ordinance No. 926 and are now codified, with certain amendments, as Ordinance No. 966 of the City of Cambridge, c. 23 of the Code of the City of Cambridge.

Sanctions for violation of the Ordinance can be severe. The Ordinance authorizes the city to take by eminent domain any apartment repeatedly or flagrantly occupied by its owner without a permit or left vacant for more than 120 days. Criminal penalties may be imposed for removing housing units from the rental market without a removal permit.[3]

In 1981, the constitutionality of the rent control laws was directly challenged in Massachusetts state courts. Relying in part upon federal takings case law, the Supreme Judicial Court upheld the ordinances in their entirety. *Flynn* v. *City of Cambridge*, 383 Mass. 152 (1981).

However, the Cambridge removal restrictions have not as yet generated such a definitive ruling by the Supreme Judicial Court. In 1983, the SJC affirmed, without opinion, the denial of a removal permit to an owner who wanted to demolish his residential building. *Fresh Pond Shopping Center, Inc.* v. *Rent Control Board of Cambridge*, 388 Mass. 1051 (1983) (equally divided court). The United States Supreme Court, also without opinion, dismissed the appeal for want of a substantial federal question. *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983). But Justice Rehnquist wrote a dissent from the dismissal in which he observed that he would have noted probable jurisdiction because the case "present[ed] important and difficult questions concerning the application of the Takings Clause." *Id.* at 876 (Rehnquist, J., dissenting). Relying on *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), he concluded that the Ordinance and removal regulations constituted a taking because they "effected a permanent physical invasion of appellant's property." *Fresh Pond*, 464 U.S. at 877.

The SJC revisited the Cambridge Ordinance in 1986 in *Polednak* v. *Rent Control Board of Cambridge*, 397 Mass. 854

[3] *See Commonwealth* v. *Kapsalis*, 26 Mass. App. Ct. 448, 450 *review den.*, 403 Mass. 1105 (1988) (affirming criminal conviction and six-month sentence of an apartment building owner who "willfully removed one or more controlled rental units from residential use by modification of them without obtaining an unconditional removal permit . . . from the rent control board.")

(1986), when it held that an owner who purchased the apartment in which she was a tenant at the time of the conversion of the unit to a condominium did not need to apply for a removal permit and that a regulation which required her to do so unless she had been the tenant prior to August 10, 1979, could not be applied to her. However, the SJC declined to assess the effect of *Teleprompter* on its holding in *Flynn*. *Id.* at 855, 862 n.9.

—B—

The Plaintiffs

There are two plaintiff entities — the Southview plaintiffs and the Blevins plaintiffs — both of which own Cambridge apartment buildings covered by the Removal Permit Ordinance.

1. *The Southview Plaintiffs* consist of a housing cooperative, which owns a residential building containing approximately 100 units, and its individual shareholders. In 1979, before the adoption of the Removal Ordinance, the owners sought to convert their building into condominiums. After the master deed was recorded, but before any of the units were sold, the Removal Permit Ordinance was adopted and became effective on August 13, 1979, thereby preventing the sale of any of the units in the building without a removal permit. The Southview Plaintiffs sought permits in January, 1980, but the Rent Control Board denied the applications in April, 1980. The Southview Plaintiffs did not seek judicial review of this determination.

The original Removal Permit Ordinance did not expressly subject cooperative housing to the removal requirement, and in 1980 the Southview owners proceeded to convert the building into a cooperative. The shareholders in the new corporation became the "owners" of the units associated with their respective shares. After these transactions, the Rent Control Board adopted an "interpretive" regulation restricting the availability of any exemption for cooperatives to those units

that were owner-occupied at the time of the adoption of the Removal Permit Ordinance in 1979.

Southview brought a state court action seeking a declaration that the interpretive application of the Removal Permit Ordinance to cooperatives was inconsistent with the Ordinance. The state courts found for the Rent Control Board. *Southview Co-operative Housing Corp.* v. *Rent Control Board of Cambridge*, 16 Mass.App. 1102 (1983). Southview also applied for removal permits, which were denied in 1980. No independent judicial review of that permit denial determination was pursued.

2. *The Blevins Plaintiffs* are two trusts of which Charles Blevins is trustee. The trusts own four residential buildings in Cambridge, with a total of 172 rental units. In 1981, after the adoption of the Removal Permit Ordinance, Blevins formed two condominium associations, intending to sell the units. At about the same time, one of the tenants in one of the buildings applied for a removal permit in order to purchase and occupy a vacant unit in the same building. Nine months later, that individual permit was granted, but by then the tenant had changed his mind, so the permit was not used. Blevins, allegedly concluding that applying for permits was futile, has never sought removal permits.

II

The federal jurisdictional grounds for this action is the Civil Rights Act of 1871, 42 U.S.C. §1983. The statute of limitations for a claim under §1983 is the general personal injury statute of limitations of the state whose action is under review. *Owens* v. *Okure*, 109 S.Ct. 573 (1989); *Wilson* v. *Garcia*, 471 U.S. 271 (1985). The relevant Massachusetts statute, Mass. Gen. L. ch. 260, §2A, provides a period of three years from the date of the injury complained of in which to initiate such a suit.[4]

[4] In treating the relevant limitations bar to be the statute of limitations rather than the doctrine of laches, I recognize that the plaintiffs here seek

Because the plaintiffs have not brought suit within that period, this action must be dismissed.

—A—

Courts confronting §1983 challenges to regulatory schemes affecting real property interests have consistently deemed the cause of action to have accrued when the plaintiff's property interest was definitively burdened by the scheme. *See, e.g., Peter Henderson Oil Co.* v. *Port Arthur*, 806 F.2d 1273, 1275 (5th Cir. 1987); *McMillan* v. *Goleta Water Dist.*, 792 F.2d 1453, 1456-57 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987); *Altair Corporation* v. *Pesquera de Busquets*, 769 F.2d 30, 32 (1st Cir. 1985).

The Supreme Court has emphasized the distinction "between a claim that the mere enactment of a statute constitutes

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only declaratory judgment, an equitable remedy. That is a strategic pleading choice. But the causes of action underlying the declaration sought are legal ones which would ultimately lead to damages if constitutional violations were declared. "[C]ivil rights claims are assertable as legal rights, enforceable in actions at law as well as in equity; hence equity's jurisdiction is concurrent, not exclusive. And since the plaintiff could have sought relief at law, the statute of limitations period is observed in equity." *Clulow* v. *State of Oklahoma*, 700 F.2d 1291, 1302 (10th Cir. 1983), *overruled on other grounds*, *Garcia* v. *Williams*, 731 F.2d 640 (10th Cir. 1984). *See also Nemkov* v. *O'Hare*, 592 F.2d 351, 355 (7th Cir. 1979); *Saffron* v. *Department of the Navy*, 561 F.2d 938, 942-44 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1033 (1978); *Williams* v. *Walsh*, 558 F.2d 667, 670-73 (2d Cir. 1977); *Madison* v. *Wood*, 410 F.2d 564, 567-68 (6th Cir. 1969). Even were I to find laches rather than the statute of limitations to be the relevant limitations bar in this proceeding, I would still be guided by the statute of limitations period. The principle was stated by Justice Black in *Cope* v. *Anderson*, 331 U.S. 461, 464 (1947) where he noted that "equity will withhold its relief . . . where the applicable statute of limitations would bar the concurrent legal remedy." At a minimum, if laches were the relevant standard, the plaintiffs would bear the burden of overturning the presumption that laches applies by showing that their delay in bringing suit was not unreasonable and that there had been no prejudice to the defendant. *Cf. McKinney* v. *Waterman Steamship Co.*, ___ F.Supp. ___, 1990 LEXIS 6948, slip op. at 8-9 (D. Mass. No. 89-0100-WD May 31, 1990) (applying laches in seaman's tort context). Plaintiffs do not even purport to undertake this burden.

a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U.S. 470, 494 (1987). Accordingly, application of the statute of limitations to plaintiffs' claims will be analyzed separately from the distinctive (1) facial and (2) as-applied perspectives.

(1) *Facial Perspective* — Viewed as a facial claim, plaintiffs' contention is that their property was definitively burdened upon the mere enactment of the Removal Permit Ordinance, an event which took place in 1979. *Cf. Lorance* v. *AT&T Technologies*, 109 S.Ct. 2261, 2268 (1989) ("Because the claimed invalidity of the seniority system is wholly dependent on the alleged illegality of signing the underlying agreement, it is the date of that signing which governs the limitations period.") The three-year limitations period, therefore, expired in 1982. Plaintiffs' present challenge to the removal permit scheme on its face — mounted some six years later — is thus barred.

(2) *As-Applied Perspective* — Viewed as an as-applied challenge distinctive from the facial challenge discussed above, plaintiffs' claims can arise only when a removal permit has been denied. That is the point at which the particular burden of the Removal Permit Ordinance definitively impacts plaintiffs' property, the point when the plaintiffs are denied a specific opportunity to remove their property from the rental market. For the Southview plaintiffs this occurred in 1980. Thus, the statute of limitations period expired on those claims in 1983. They have made no new permit applications since then and therefore, as discussed in Section II.C. *infra*, any new as-applied challenge to the Removal Permit Ordinance is not yet ripe. The Blevins plaintiffs have never been denied a permit; accordingly, for reasons set forth in Section II.C. *infra*, they also are unable to present an as-applied challenge ripe for judicial determination.

—B—

The plaintiffs seek to avoid the statute of limitations bar by arguing (1) the bar is inapplicable in the declaratory judgment context, (2) the bar is tolled because the burden of rent control is a continuing one and (3) the bar is inappropriate in the context of constitutional challenges to ongoing regulatory schemes.

(1)

The plaintiffs contend that their declaratory judgment action is essentially defensive and thus falls outside the scope of the statute of limitations. The statute of limitations, however, may not be sidestepped simply by labelling an action one for declaratory or injunctive relief, rather than one for damages. *Town of Orangetown* v. *Gorsuch*, 718 F.2d 29, 42 (2d Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984). Instead, courts look to the "substance of a claim" and "[i]f this examination reveals that a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern." *Id.*

The plaintiffs argue that there should be no limitations bar when a potential defendant in an enforcement action seeks to bring a declaratory judgment suit. This contention was disposed of by the Temporary Emergency Court of Appeals in *Mobil Oil Corp.* v. *Dept. of Energy*, 728 F.2d 1477, 1487 (Temp. Emer. Ct. App. 1983), *cert. denied*, 467 U.S. 1255 (1984). The *Mobil Oil* court found that while there was "little authority" on the question, the authority available suggested that a declaratory judgment plaintiff could not, for purposes of statutes of limitations, "be assimilated to the status of a defendant." *Id.* at 1487-88.[5]

[5] *Mobil Oil*, while arising in the laches setting, treated the analysis on this point for laches purposes to be the same as the analysis for statute of limitations purposes. *See also* note 4 *supra*.

The proposition for which *Gorsuch* and *Mobil Oil* stand — that the statute of limitations is applicable to parties who initiate affirmative litigation designed to challenge regulatory provisions which have otherwise survived the limitations period — was underscored evocatively by the Second Circuit in *118 East 60th Owners, Inc.* v. *Bonner Properties, Inc.*, 677 F.2d 200 (2d Cir. 1982). In *Bonner Properties*, the court labeled a plaintiff initiating affirmative litigation to challenge a settled relation between the parties as the "aggressor" because the action attempted to disturb an equilibrium established after a ten-year period of inactivity. *Id.* at 204.[6]

Of course, a party cast as a defendant in litigation may be relieved from the statute of limitations. For instance, the statute of limitations does not bar a defendant in an enforcement action, whether criminal or not, from disputing the constitutionality of the statute he is charged with violating. *Cf. Stone* v. *White*, 301 U.S. 532, 539 (1937). *Cf.* Monaghan, *Overbreadth*, 1981 Sup. Ct. Rev. 1, 8 n.30 ("A 'defendant in a coercive proceeding . . . always has standing to challenge the validity of the statute in the terms in which it is applied to him.' [BATOR, MISHKIN, SHAPIRO & WECHSLER] HART & WECHSLER'S [THE FEDERAL COURTS AND THE FEDERAL SYSTEM] 1981 Supplement at 88. But the position of a prospective defendant bringing an action for declaratory relief need not be assimilated to that of an actual defendant.") Thus, as Professor Monaghan suggests, a plaintiff bringing a declaratory judgment action under §1983 is not thereby cast — or "assimilated" — in a "defensive" posture. Otherwise, any plaintiff

[6] Plaintiffs cite an older Second Circuit case, *Luckenbach S.S. Co.* v. *United States*, 312 F.2d 545 (2d Cir. 1963) for the broad proposition that any claim which could provide a defense may be asserted without regard to a statute of limitations bar. *Luckenbach*, however, involved a passive assertion of nonliability for payments allegedly due and did not arise in the context of an affirmative attack upon a regulatory scheme. To the degree *Luckenbach* has survived subsequent case law development in *Bonner* and *Gorsuch*, it stands for an exceptionally narrow exception to the applicability of the statute of limitations bar to declaratory judgment actions.

might style his §1983 action for damages as a declaratory judgment action and avoid the statute of limitations altogether. If such a declaratory judgment plaintiff could freely characterize himself as being in a "defensive" posture, the constitutionality of any regulatory provision — no matter how long standing — could be subject to judicial review at any time without regard to the values of repose the statute of limitations protects.

(2)

The plaintiffs argue that because the permit removal scheme is a continuing regulation the statute of limitations period has never truly accrued. The argument is mounted by erroneous reliance upon a case involving land taken by the rising waters of a dam. *United States* v. *Dickinson*, 331 U.S. 745 (1947). In *Dickinson*, the Court held that the running of the statute did not necessarily commence when the dam first began to impound the water. Quoting selectively from the opinion, the plaintiffs look to the following language, underscored and elided as the plaintiffs have presented it in their brief:

> *The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous.* . . . When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided.

Id. at 749 (as presented in "Plaintiffs' Memorandum in Opposition to the Defendant's Motion to Dismiss" at 37).

The answer to plaintiffs' argument is contained in the sentence represented only by the ellipsis in their quotation from *Dickinson*. In that sentence, the Court observed: "And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Id.* This is simply

another way of stating — in the context of water damage — that the period for bringing an action *does* accrue when "the situation becomes stabilized," in other words when the plaintiff's property is definitively burdened by the governmental action.

The First Circuit alluded to the critical distinction in *Altair Corporation*. There the court rejected an

> argument concerning the continuing violation exception to the general rule [regarding the limitations bar because it] confuses a continuing act with a single act that has continuing consequences. *Ward* v. *Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981) ("A continuing violation is occasioned by continuing unlawful acts, not by continued ill effects from an original violation.") In a §1983 case concerning the unlawful taking of property, the statute of limitations begins to run on the date of the wrongful appropriation.

769 F.2d at 32.

(3)

The plaintiffs place their opposition to the statute of limitations bar on the highest policy level by arguing that constitutional challenges are not subject to limitations periods. Apparently, plaintiffs contend that any legislative enactment should be subject at all times and by any procedure to constitutional challenge. Apart from the inherent and continuing interest that constitutional disputes have for lawyers, however, there is no good reason to depart in constitutional cases from the principles of repose protected by statutes of limitation.

The principles of repose are particularly salient in connection with economic regulatory schemes from which a complex web of reliance interests is woven over time. Various parties make decisions based on expectations that the regulatory

scheme will not be disrupted except by the customary political and administrative process. Thus, belated judicial intervention may significantly prejudice not only the defendant public instrumentality but also the various affected parties who have relied on the regulatory scheme.

Plaintiffs suggest that applying limitations periods to defensive declaratory judgment actions could effectively immunize constitutionally repugnant state action from review. That characterization overstates the proposition. A state enactment would simply be protected from belated challenge by affirmative litigation. The enactment would continue to be subject to reevaluation if any party to an enforcement proceeding raises an affirmative defense of unconstitutionality. "A defendant in a coercive action always has standing to challenge the rule actually applied to him." Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 Sup. Ct. Rev. 195, 195.

Thus, application of the statute of limitations bar to constitutional questions represents a carefully calibrated balancing of the interest in repose and of the requirement that no person be subject to "sanctions unless they are imposed in accordance with a constitutionally valid rule . . ." *Id.*

When a new enactment is initially adopted, a party claiming to be burdened is permitted a reasonable time to challenge its facial constitutionality; the statute of limitations establishes that reasonable time.

Even after the statute of limitations has run, a party may still test the constitutionality of the enactment as applied to his own circumstances if the enactment provides a mechanism, by permit or otherwise, for that party to demonstrate how the enactment applies to him. Thus, as developed more fully in Section II.C. *infra*, a party who seeks and is denied a permit can recommence the running of the statute of limitations by mounting an "as applied" challenge.

Finally, the affected party may place himself in the posture of a defendant in an enforcement action by noncompliance with the ordinance at any time. His noncompliance and the

consequent enforcement action will provide a vehicle for him to challenge the constitutionality of the provision.

In short, the constitutionality of an ordinance is always open to challenge, but the procedures for doing so — in recognition of the values of repose — place increasing burdens over time on the party who seeks to challenge the equilibrium the regulation has created.

—C—

In order to mount an as applied challenge to the Removal Permit Ordinance, the plaintiffs must show that the Ordinance applies specifically to them and harms them individually. As discussed above in Part II.A., *supra*, the statute of limitations may begin to run on an as-applied challenge once a plaintiff is denied a removal permit. Somewhat differently stated, an as applied challenge cannot be ripe until the plaintiff is denied a removal permit. These parallel concepts of accrual and prematurity govern the timeliness of an "as-applied" challenge.

> In suits for wrongful deprivation of property under 42 U.S.C. §1983, the same considerations that render a claim premature prevent accrual of a claim for limitations purposes, and the claim does not accrue until the relevant governmental authorities have made a final decision on the fate of the property.

Norco Construction, Inc. v. *King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (Kennedy, J.).

The permit application requirement is not a mere formality; it is the means for framing the dispute with finality.

In order to raise an "as applied" challenge, especially in the takings context, a party must take the steps necessary to demonstrate how the ordinance is applied to him. In its most recent treatment of a takings challenge to rent control, the Court admonished that

> [g]iven the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a determination necessary." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-295 (1981). In *Virginia Surface Mining*, for example, we found that a challenge to the Surface Mining Control and Reclamation Act of 1977 . . . was "premature", 452 U.S. at 296 n.37 and "not ripe for judicial resolution," *id.* at 297, because the property owners in that case had not identified any property that had allegedly been taken by the Act, nor had they sought administrative relief from the Act's restrictions on surface mining.

Pennell v. *City of San Jose*, 485 U.S. 1, 10 (1988).

Establishing ripeness for a judicial review in the context of a regulatory regime alleged to involve a taking turns on the availability of a permit to obtain desired relief. Again the Supreme Court has spoken emphatically.

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).

As the Supreme Court later observed,

> [o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.

MacDonald, Sommer & Frates v. *Yolo County*, 477 U.S. 340, 351 (1986).

The First Circuit has expressed this concern with the ripeness of a taking claim by holding that

> so long as the regulation does not finally take the plaintiff's property, and provides a reasonable means for seeking amendment of the initial action, state administrative action which temporarily limits the use or value of property is not yet ripe for a takings claim.

Tenneco Oil Co. v. *Dept. of Consumer Affairs*, 876 F.2d 1013, 1026-27 (1st Cir. 1989).

In the context of the Cambridge Removal Permit Ordinance, this ripeness requirement necessitates applying for a permit. The permit process would either relieve the plaintiffs of the burden of complying with the Ordinance or demonstrate clearly the way in which Ordinance does in fact burden them. Neither plaintiff entity has applied for a permit at any time within the statutory limitations period. Consequently, neither presents an as applied challenge ripe for judicial resolution.

—D—

Plaintiffs' case is not properly timed to permit judicial resolution. To the degree plaintiffs seek review of the mere enactment of the Removal Permit Ordinance or the failure to issue permits sought more than three years ago, the statute of lim-

itations bars their action and they are too late. To the degree plaintiffs seek to predicate review on the prospect that future applications for permits will be unsuccessful, the issues are not ripe and they are too early. In either event, plaintiffs' claims must be dismissed because they are untimely.

III

Apart from the timeliness grounds discussed in Section II, *supra*, there is an alternative basis for dismissing this law suit: the questionable propriety of the federal declaratory judgment device as a means to obtain a partial resolution of the question whether the "takings" clause of the Fifth Amendment to the United States Constitution is implicated by the Cambridge Removal Permit Ordinance. I find that a federal declaratory judgment action is not an appropriate procedure in this case to resolve a "takings" clause law suit. My conclusion depends in equal part upon the special character of "takings" litigation and the special qualities of the declaratory judgment device.

Given the highly deferential analysis applied to due process[7]

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[7] The plaintiffs' substantive due process claim as pleaded cannot withstand review on the merits. As the First Circuit recently observed, quoting from a case considering a previous exercise in land use regulation by the City of Cambridge:

> The test to be applied in considering substantive due process challenges to a land use ordinance was established early on: "a court should not set aside the determination of public officers in [zoning] matter[s] unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow* v. *Cambridge*, 277 U.S. 183, 187-88 (1928) quoting *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Smithfield Citizens for Fair Zoning v. *Town of Springfield*, ____ F.2d ____, ____, slip op. at 10-11 (1st Cir. No. 89-1819, July 2, 1990). Thus, in adjudicating such a claim "a court asks only whether a *conceivable* rational relationship exists between the ... ordinance and legitimate governmental ends." *Id.* at 13 (emphasis in original). *See also*, *Tenoco Oil Co.* v. *Department of Consumer Affairs*, 876 F.2d 1013, 1021-22 & n.15 (1st Cir. 1989).

and equal protection[8] challenges of economic enactments such as the Cambridge rent control scheme, the "takings" clause has increasingly been seized upon as a convenient handle for obtaining judicial scrutiny of such enactments.

Takings litigation, however, is an oblique means of challenging economic enactments. This is because, assuming a proper public purpose, the takings clause is not a basis for directly overturning a form of regulation. Rather, it is a mechanism for attaching a price tag to certain action the government seeks to undertake. The Fifth Amendment taking clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The takings clause thus "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Presault* v. *Interstate Commerce Commission*, 110 S.Ct. 914, 921 (1990) (quoting *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987)).

A takings clause claim has two essential components: the taking itself and the lack of just compensation. Proper adjudi-

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The relationship between limitations on removal of housing from the rental market and the goal of providing adequate rental housing is apparent from the emergency declaration to and structure of the Removal Permit Ordinance. Such a relationship requires no further development to survive plaintiffs' substantive due process challenge.

[8] The plaintiffs' equal protection claim also cannot withstand review on the merits. As the Supreme Court recently observed in rejecting an equal protection challenge to aspects of a rent control scheme,

> [the municipality] need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest . . . we will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Pennell v. *City of San Jose*, 485 U.S. 1, 14 (1988) (citations omitted). However misguided some may view rent control generally and the removal permit process specifically, it cannot be said that the enactment of such schemes is irrational.

cation of such claims requires special considerations designed to insure the constitutional questions are fully developed before they are resolved. A necessary implication of those procedures is that a proposed use of declaratory judgment to address only one of the elements must be scrutinized carefully to avoid the dangers of inadequate development of the constitutional issues. In this case, declaratory judgment as to only the takings element would be inappropriate; and, consequently, even if the plaintiffs' claims were timely, I would decline to exercise my discretion to hear plaintiffs' law suit.

—A—

In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court held that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

As the *Williamson* Court observed, the Fifth Amendment does not require that compensation be paid in advance of or even at the same time as the taking. *Id.* at 194. Assuming state procedures are adequate, "no constitutional violation occurs until just compensation has been denied." *Id.* at 194 n.13.

In *Ochoa Realty Corp.* v. *Faria*, 815 F.2d 812 (1st Cir. 1987), the First Circuit relied on *Williamson* and *Culebras Enterprises Corp.* v. *Rios*, 813 F.2d 506 (1st Cir. 1987) in holding that "exhaustion of state law remedies — whatever form they may take — is a precondition to the maintenance of a federal damages action under the Takings Clause." *Ochoa Realty Corp.*, 815 F.2d at 817.[9] *Ochoa* and *Culebras* agreed that

[9] The reference to "exhaustion of state law remedies" in *Ochoa* may be somewhat misleading because it presents the potential for confusing *Williamson's* requirement of finality as a prerequisite to bringing a state takings action in federal court with the holding of *Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982) that exhaustion of remedies is not a necessary

Puerto Rico case law — despite the absence of an explicit statute — indicated Puerto Rican courts would entertain an inverse condemnation action for damages. *Id.*

The Massachusetts inverse condemnation statute expressly provides for compensation "[w]hen the real estate of any person has been taken." M.G.L. c. 79, §10. "Mass.Gen.L. ch.79, §10 provides a specific statutory remedy for governmental actions which amount to a taking without formal condemnation proceedings." *Ackerley Communications of Massachusetts, Inc.* v. *Somerville*, 692 F.Supp. 1, 28 (D. Mass. 1988), *rev'd on other grounds*, 878 F.2d 513 (1st Cir. 1989). *See Fram* v. *Boston*, 363 Mass. 68, 72 (1973) ("If there had been a 'taking' of the plaintiff's property other than pursuant to a formal vote of the authority, the plaintiff would still have been entitled to petition for the assessment of damages.")

Plaintiffs suggest that a Massachusetts inverse condemnation proceeding is unavailable because an exception in Mass. Gen. L. ch. 79, §10 denies access to the §10 proceeding if the taking was "effected by or in accordance with a formal vote or order of the board of directors of a body politic." *Id.* Plaintiffs, however, take these words out of context. The "formal vote or order" referred to in §10 are the predicates for formal eminent domain proceedings in which the condemnation is direct not inverse. Here the alleged takings were inverse rather than direct, so the Massachusetts' inverse condemnation procedure under §10 provides the plaintiffs with an adequate means of obtaining just compensation for any alleged taking.

Plaintiffs correctly point out that *Williamson*, *Ochoa*, and *Culebras* may be distinguishable because they were all actions for damages. On that basis, plaintiffs seek to limit the effect of *Williamson* to state takings litigation for money damages. The *Williamson* court, however, found that "no constitutional

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prerequisite to bringing a §1983 action. The concepts of finality and exhaustion are clearly distinguished in a helpful discussion in *Tennoco Oil Co.* v. *Dept. of Consumer Affairs*, 876 F.2d 1013, 1024-24 (1st Cir. 1989). It appears that the *Ochoa* reference to "exhaustion" was intended to refer to the concept of finality in the takings context.

violation" could be established until the property owner utilized the inverse condemnation proceeding. 473 U.S. at 194 n.13. Logically, "no constitutional violation" means no violation for declaratory relief purposes as well as for any damages purposes. This proposition recognizes that while takings litigation can, for analytical purposes, be split into two basic elements — the taking itself and the compensation for it — the two elements are inextricably intertwined. Determining whether a regulatory taking affects part of the complex bundle of rights which constitute a real property interest requires some inquiry into the compensable value of those rights. This inquiry is effectively the equivalent of the damages inquiry which *Williamson* and *Ochoa* require to be deferred by the federal court until state proceedings are finalized.[10]

While the *Williamson* line of cases may not on its own directly bar plaintiffs' takings claims as unripe, these cases clearly demonstrate the logic of a rule requiring federal courts to defer resolving any state takings issues when a state inverse condemnation is available, but has not been pursued. Resort

[10] The First Circuit has suggested that federal equitable relief might be available in state takings cases even if a federal damage action must await resolution of the state condemnation action. *See generally Culebras Enterprises Corp.* v. *Rivera Rios*, 813 F.2d 506, 509-12 (1st Cir. 1987) and cases cited. But those cases were concerned with the then-unresolved question whether a temporary taking was compensable. If such a taking were not compensable — that is if there were no money damages ultimately available for the period until a definitive judicial determination that a taking had occurred — a party challenging the taking would demonstrate irreparable harm sufficient to justify injunctive intervention. But, as the First Circuit recently noted in *Tenneco:* "[t]he Supreme Court subsequently . . . held that damages are retrospectively available for the period of the 'temporary' takings, *i.e.* regulatory takings ultimately invalidated as unconstitutional by the courts. *See First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987)." 876 F.2d at 1026 n.20. Thus, the considerations which may have impelled equitable intervention before *First English Evangelical Lutheran Church* in order promptly to establish that a compensable taking had occurred are no longer applicable. It is now established that just compensation is available for the duration of a taking no matter how long a period is consumed before the courts definitively determine that the taking has occurred.

to the state proceeding would appear to be a necessary precondition to establishing the finality required before federal courts may consider state takings no matter how the cause of action is styled.

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Irrespective of whether the *Williamson* line of cases is to be applied with full force to bar state takings claims seeking declaratory relief, I would decline jurisdiction in this case. Federal declaratory judgment should not become a ready procedural mechanism for the federal courts to reevaluate state economic legislation from a takings perspective until state procedures have run their course. Nothing in this case commends itself to any premature federal intervention.

The power to grant a declaratory judgment clearly rests in the discretion of the district court. *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 126 (1968). *See generally* Wright, Miller & Kane, *Federal Practice and Procedure*, §2759 at 644 (1983). The trial court's discretion, of course, is not absolute, and the court may not refuse to entertain a declaratory action "as a matter of whim or personal disinclination." *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112 (1962). Here, however, the availability of the Massachusetts inverse condemnation proceeding provides a principled basis for declining to exercise the discretion to entertain a declaratory judgment proceeding.

Of course, the existence of "another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Fed. R. Civ. P. 57. But in the exercise of its discretion, the court may deny declaratory relief if the state courts can more effectively resolve the claim. *See Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942) (federal declaratory judgment court has duty to ascertain whether questions in controversy can better be settled in state court proceeding).

Professor Moore observes that:

> [t]he fact that in the future another action might be instituted, which would involve the same issues, is not alone sufficient reasons to ground a denial of declaratory relief. Where, however, the other remedy would be a more effective or appropriate remedy the court may properly decline to assume jurisdiction in the declaratory action.

6A *Moore's Federal Practice* ¶57.08[3] at 57-44 (2d ed. 1989). Professor Moore also notes "some authority that where a special statutory remedy has been provided, declaratory action should be refused." *Id.* The Massachusetts courts can fully — through an inverse condemnation proceeding — review any claim that the Removal Permit Ordinance is unconstitutional or that the level of compensation is inadequate.

Declining to exercise federal declaratory judgment jurisdiction over state takings disputes until the conclusion of state procedures also supports the "public interest" in insuring that the federal courts "avoid needless determination of constitutional questions which may lead to a needless obstruction of the domestic policy of the states." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 471 (1945). That "public interest" is "of controlling significance" in determining whether to exercise the "discretionary power to grant or withhold the declaratory remedy." *Id.*

"A declaratory judgment," Justice Frankfurter observed:

> like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative.

Eccles v. *Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948) (citations omitted).

A constitutionally based concern that the federal courts not provide advisory opinions in the state takings context must restrain the exercise of declaratory judgment jurisdiction here. As Chief Justice Stone observed in *Alabama Labor Federation* v. *McAdory*, the federal courts are "without power to give advisory opinions . . . It has long been the [federal courts] considered practice not to decide abstract, hypothetical or contingent questions . . ." 325 U.S. at 461.

To be sure, the Supreme Court has found itself addressing the problems of state takings in somewhat abstract, hypothetical and contingent settings. The Court noted one of the problems thereby created in its most recent case involving a state rent control scheme. *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988). Observing the difficulties created in evaluating the standing of the parties, the Court commented:

> [W]e recognize that the record in this case leaves much to be desired in terms of specificity for purposes of determining the standing of appellants to challenge this Ordinance. Undoubtedly this is at least in part a reflection of the fact that the case originated in a state court where Art. III's proscription against advisory opinions may not apply.

Id. at 8. It bears noting that the adjudication of intensely fact bound questions on limited records has not necessarily served the federal courts well in developing the law of just compensation.[11] The practice should not be encouraged.

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[11] The desire to obtain a Supreme Court decision on interesting constitutional questions in the takings context and the Court's occasional willingness to provide one — even in the absence of an adequately developed record — may account for the view of certain commentators "that it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray [than current takings clause doctrine]." Peterson, *The Takings Clause: In Search of Underlying Principles: Part I — A Critique of Current Takings Clause Doctrine*, 77 Calif. L. Rev. 1299, 1304 (1989). *See also* Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings* to *Symposium: The Jurisprudence of Takings*, 88 Colum. L. Rev. 1581, 1589 (1988) ("The symposium

Whether or not state courts are willing to provide advisory opinions on limited records, the recognition that the record in federal declaratory judgment action will not fully develop both elements of the state taking question should make the federal courts all the more reticent about being drawn into giving partial answers to the complex constitutional questions presented by takings litigation. Here I am asked only to decide whether there is a taking without addressing the rest of the constitutional puzzle: if there is a taking, is just compensation being provided? The first element is ultimately meaningful in a constitutional sense only if coupled with the second element.

The strategic[12] — and theoretical[13] — implications of decla-

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articles offer some insight into why the Supreme Court has so far failed to come up with a more coherent approach to the regulatory taking issue."); Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 44 ("If takings litigation had been unsettled before the recent Term, it is surely unsettled now.").

[12] A preemptive federal declaratory judgment action no doubt commends itself to plaintiffs because their ultimate goal, the dismantling of Cambridge's rent control scheme, can be achieved indirectly. If the federal court can be induced to find the Removal Ordinance Permit constitutes a "taking," the City "may elect to abandon its intrusion or discontinue regulations." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S.Ct. 2378, 2387 (1987). Courts may be perceived to be more willing to make such a declaration if they are not bound to consider at the same time the economic impact of the holding on the municipality. These considerations appear to be at the core of the preference the California Supreme Court expressed for equitable relief over an inverse condemnation remedy when confronting challenges to land use regulation.

> In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances.

Agins v. *Tiburon*, 24 Cal.3d 266, 276-77, 157 Cal.Rptr. 372, 378, 598 P.2d 25, 31 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Whether and, if so, to what degree the California preference for declaratory judgment procedures in evaluating takings challenges to land use regulations will survive *First English Evangelical Lutheran Church* is unclear. *See generally*, *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S.Ct. at 2397-98 (Stevens, J., dissenting). Suffice to note for present purposes that the use of the declaratory judgment procedure, while having certain strategic

ratory judgment takings litigation as a mechanism for judicial review of economic enactments are subtle, potentially powerful and far ranging. The current constitutional doctrines in the area of takings and just compensation are seen by the commentators as being in disarray. *See* note 11, *supra*. It is an area in which it is important to tread carefully with a full understanding of the precise way in which the state program affects the subject property.[14] This is especially true when issues of judicial federalism are implicated. Invitations such as the one plaintiffs offer to the federal courts to issue contingent constitutional advisory opinions through declaratory judgments regarding pieces of the problem should be resisted. The conse-

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value to private plaintiffs and even to governmental entities — if they choose to employ it — is potentially subject to complex procedural questions in the takings area quite apart from the complexities introduced by considerations of judicial federalism. In Massachusetts, those complexities are further magnified by the special limitations placed on declaratory judgment procedures in rent control litigation. *Cf.* Massachusetts Acts of 1970, c. 842, §10 (limiting use of state declaratory judgment procedures in judicial review of rental control disputes to circumstances in which administrative remedies have been exhausted).

[13] The use of the preemptive federal declaratory judgment action in takings litigation is consistent with a broader constitutional agenda: the search for an effective and speedy mechanism to provide a broad scale constitutional challenge to modern social and economic legislation. Professor Epstein, one of the chief theoreticians in this constitutional school, is quite candid in assessing the larger implications of his views that land use regulation is a taking. "It will be said that my position invalidates much of twentieth century legislation and so it does." R. Epstein, *Takings* 281 (1985). *But see* R. Bork, *The Tempting of America* 230 (1990) ("Epstein's constitution would repeal much of the New Deal and the modern regulatory welfare state but . . . these conclusions are not plausibly related to the original understanding of the takings clause. . . . Epstein has written a powerful work of political theory . . . but has not convincingly located that political theory in the Constitution.").

[14] *Cf. Tenneco Oil Co.* v. *Department of Consumer Affairs*, 876 F.2d 1013, 1028 (1st Cir. 1989) ("the requirement that the developer seek a variance would not only insure that the Court did not needlessly make constitutional rulings, but also that the Commission be put to the test when faced with the type of evidence which would build an administrative record and provide information by which a court could evaluate the validity of the zoning ordinance's application.")

quences of asserting jurisdiction through declaratory judgment actions are every bit as inconsistent with the proper role of the federal courts in a federal system as the premature damage actions which the *Williamson* line of cases expressly rejects.

IV

For the reasons set forth more fully above, the plaintiffs' claims[15] are hereby dismissed.

s/ DOUGLAS P. WOODLOCK

DOUGLAS P. WOODLOCK
United States District Judge

[15] The text of this memorandum has dealt solely with the federal civil rights claims asserted by the plaintiffs. Having determined to dismiss those claims I find no basis to continue to exercise pendent jurisdiction over the remaining pendent state claims. *See generally United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966); *Brennan* v. *Hendrigan*, 888 F.2d 189, 196 (1st Cir. 1989).

ADDENDUM C

U.S. Const. amend. V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV § 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Mass. Gen. Laws

C. 79 §10. Award of Damages Caused by Acts in Pais.

When the real estate of any person has been taken for the public use or has been damaged by the construction, maintenance, operation, alteration, repair or discontinuance of a public improvement or has been entered for a public purpose, but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, or when

the personal property of any person has been damaged, seized, destroyed or used for a public purpose, and by such taking, damage, entry, seizure, destruction or use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter. If the injury was caused by or on behalf of the commonwealth or of a county, city, town or district, the officer or board of officers under whose direction or control the injury was caused shall award the damages upon the petition of any person entitled thereto. If the injury was caused by a railroad corporation, the county commissioners of the county in which the property taken, damaged, entered upon, seized, destroyed or used was located, and, if the injury was caused by a private corporation other than a railroad, the aldermen of the city or the selectmen of the town in which such property was located, shall award the damages upon the petition of any person entitled thereto or of the corporation liable therefor. In case of a specific taking, entry, seizure or other act causing destruction or damage or depriving the owner of the use of his property permanently or for a definite period of time the damages shall be assessed as of the date of such taking, entry, seizure or other act and the right thereto shall vest on such date and a petition for an award of damages therefor under this section may be filed within one year thereafter; otherwise damages shall be assessed with respect to any parcel of property as of the date when such property was first injuriously affected, the right thereto shall vest upon the completion of the public improvement which caused the injury, and a petition for an award of damages therefor under this section may be filed within one year after such completion.

CHAPTER TWENTY-THREE

REGULATIONS PERTAINING TO CONTROLLED RENTAL HOUSING UNITS

CAMBRIDGE, MASS. ORDINANCE NUMBER 966
Incorporates Ordinance 926 and all amendments thereto

Section 1. Removal of Controlled Rental Units from Market.

(a) *Declaration of emergency.*
A serious public emergency continues to exist in the City of Cambridge with respect to the housing of a substantial number of its citizens, as declared by Chapter 36 of the Acts of 1976, for the reasons stated in the Act. The emergency has worsened since 1976 because of the removal of a substantial number of rental housing units from the market, by condominium conversion, demolition, and other causes. As a result, more than 2,000 or over 10 percent of the controlled rental units in the city have been removed from the housing market since 1970, and the vacancy rate has fallen below one percent. In order to carry out the purposes of the Act, and to continue to provide a sufficient supply of decent, affordable rental housing accommodations especially for families of low and moderate income and for elderly people on fixed incomes, it is necessary for the Cambridge City Council, in the exercise of its powers under section 6 of the Home Rule Amendment and under section 5(c) of the Act, to regulate the removal of controlled rental housing units from the market.

(b) *Definitions.* As used in this section:
(1) "Act" means Chapter 36 of the Acts of 1976, as amended from time to time.
(2) "Board" means the Rent Control Board established by section 5 of the Act.

(3) "Controlled rental unit" means any unit included in the definition under section 3(b) of the Act.

(4) "Removal from the market" as applied to a controlled rental unit, includes but is not limited to:

(i) occupy, as an owner of a unit which is a condominium unit, if the last previous occupant was a tenant, even if the prospective owner-occupant is the tenant, unless the prospective owner-occupant is the current tenant of the unit who has continuously occupied it as a tenant since before August 10, 1979 and intends in good faith to occupy it indefinitely as its owner; or

(ii) demolish, but no unit has been removed from the market by demolition until its physical destruction has begun; or

(iii) rehabilitate, repair or improve, other than as required by the laws of the Commonwealth or the city, in such a way as to prevent residential occupancy during the course of the rehabilitation, repair or improvement. This provision shall not apply to rehabilitation, financed at least in part by Community Development Block Grant funds, of a building owned by a non-profit corporation and intended for owner-occupancy by low and moderate income persons; or

(iv) convert to a cooperative, as the term is used in section 3(b)(4) of the Act, all or part of any building which contains any controlled rental unit; or

(v) cause a unit, not the primary residence of a legal unit owner, to be vacant for one hundred twenty (120) days or more by refusing to rent or to offer for rent said unit in good faith or, when a unit is cited as unfit for human habitation, by

failure to perform repairs required to restore said unit to habitable condition. The existence of a vacancy for one hundred twenty (120) days or more, without a showing of good cause, shall constitute removal from the market.

But, this term "removal from the market" does not include occupancy of a non-condominium unit by the owner of the building in which it is located or by any member of his/her immediate family; or a condominium unit which the owner occupied before the tenant occupied it; or a condominium unit as to which unit it can be shown with respect to its initial sale after the recording of the master deed that a purchase and sale agreement has been entered into prior to August 10, 1979, a cancelled check being conclusive proof of the transaction, or a unit deed recorded in the Middlesex Registry of Deeds prior to August 10, 1979, whether or not the unit was being used for rental housing on August 13, 1979. No condominium unit once legally occupied by the unit owner shall ever again be subject to this section for any reason.

(c) *Removal regulated.*

No owner or other person shall remove from the market any controlled rental unit, unless the Board after a hearing grants a permit. The Board may issue orders and promulgate regulations to effectuate the purposes of this section, and to prescribe the procedure for applications, notice, hearings, and the granting and withdrawal of permits. A permit to remove from the market a unit in a building converted or proposed to be converted to a condominium may be granted to the owner of the building before the sale of a unit. One year after the date of a notice of ruling, the Board shall review and confirm that the circumstances and conditions which led the Board to

grant any removal permit hereunder, except for a condominium unit legally occupied by the unit owner, continue to warrant said permit. If after a hearing the Board finds that the circumstances and conditions no longer warrant the permit, the Board shall immediately treat the unit as a controlled rental unit and shall initiate whatever action is permitted and appropriate under this section.

(c½) *Prohibited acts by developers.*

After August 1, 1981, no owner of a building for which a condominium master deed has been recorded shall directly or indirectly sell, or offer for sale, or agree to sell any controlled rental unit therein, unless the Board has granted a removal permit for that unit, or unless the sale or offer is to, or the agreement is with, a current tenant of the unit who holds an exemption certificate. The Board shall issue an exemption certificate to any person who files with it an affidavit in a form prescribed by the Board, stating that he is a current tenant of the unit, that he occupied it as a tenant before August 10, 1979, and that he intends in good faith to occupy it indefinitely as its owner. No person shall file a false affidavit under this subsection. Nothing in this subsection shall prevent an owner of a building or any portion thereof from conveying his entire interest in the building in good faith to one purchaser, who shall then be subject to the provisions of this subsection to the same extent as the original owner.

(d) *Considerations.*

In deciding whether to grant a permit under this section, the Board shall consider:

(1) the benefits to the persons sought to be protected by the Act and by this section,

(2) the hardships imposed on the tenants residing in the unit proposed to be removed, including any mitigating provisions made by the appellant, and

(3) any aggravation of the shortage of decent rental housing accommodations, especially for families of low and moderate income and elderly people on fixed incomes, which may result from the removal.

(d½) *Limited equity cooperative ownership.*

As used in this subsection, "administrator" means the Assistant City Manager for Community Development or his or her designee. Notwithstanding the considerations of subsection (d), the Board may grant a permit for conversion to limited equity cooperatives only if the administrator files with the Board an agreement executed by the administrator and a cooperative housing corporation which shall contain the following provisions:

(1) All cooperative documents and all amendments or modifications of the cooperative documents shall be valid only if executed by the administrator and the articles of incorporation shall so provide. The cooperative documents include the articles of incorporation, the by-laws, occupancy agreements, transfer agreements, and management plan. Each transfer shall be reported to the administrator and all documents effecting the transfer shall be executed by the administrator. The administrator shall execute documents only if each of the provisions of this subsection is met.

(2) The resale price of the cooperators' membership which includes the right to occupy the unit shall not exceed the transfer value plus the amount of principal amortized by the corporation on its blanket mortgage attributed to the unit and paid by the member involved, less any amounts due to the cor-

poration under the occupancy agreement and less the cost of all deferred maintenance and repairs deemed necessary by the corporation to put the dwelling in a suitable condition for another occupant.

The transfer value is the sum of:

—the share value paid by the former occupant of the unit (not including the amount of any subsidies) adjusted from the date of the stock payment by the Consumer Price Index for Housing for the Boston Standard Metropolitan Statistical Area.

—the value of improvements approved by the corporation and installed by the member in his unit, including a fair value of labor donated by a member or others as conclusively established by the administrator at the time the labor is donated.

(3) Residents of at least 80% of the units in the building as of the date of the articles of incorporation shall sign commitments to become resident shareholders of the limited equity housing corporation.

(4) A majority of the current residents must be low and moderate income persons as defined by the current income limits set forth in regulations of Department of Housing and Urban Development, under Section 235 of the National Housing Act or its successor or comparable index as determined by the administrator.

(5) Current residents who do not become shareholders shall have the right to remain in their units as tenants of the cooperative corporation. Controlled rental units shall remain subject to the Act and to this section and no permits shall issue for controlled rental units while occupied by non-shareholding tenants. If a controlled rental unit is vacated, that unit may be converted to a cooperative subject to the provisions of this subsection and to the cooperative documents.

(6) Residents of the City of Cambridge who are low and moderate income persons, as defined in paragraph (4), shall be given priority when turnover or vacant units occur.

(7) There shall be no discrimination on the basis of race, religion, color, national origin, sex, age, ancestry or marital status with respect to any aspect of the operation of the cooperative.

(8) Family size per unit shall conform to Chapter II of the State Sanitary Code or other comparable index as determined by the administrator.

(9) Buildings shall have at least six units.

(10) In addition to other remedies, the city may recover in damages twice the amount of any net gain or resale which exceeds the amount allowed by paragraph (2), and this provision may not be waived in any manner.

The total number of units for which such permits may be granted shall not exceed 100.

The Board shall revoke any permit granted pursuant to this subsection whenever it or the administrator determines that any of the provisions of paragraphs (1), (2), (5), (6), (7), or (9) have been materially violated or invalidated and the unit shall then again be subject to the Act and to this section, notwithstanding the last sentence of paragraph (iv) of subsection (b) or any other provisions.

(e) *Effectiveness.*

This section shall apply to all controlled rental units which had not been removed from the market before August 13, 1979. This section shall take effect immediately, but shall cease to be effective if the Board files its certificate with the city clerk that:

(1) the vacancy rate in the total supply of controlled rental units exceeds four percent, or

(2) the total number of rental units in the city excluding public housing units, exceeds that number as of January 1, 1970.

If such a certificate ceases to be correct, the Board shall withdraw it by filing a new certificate, and this section shall then again be effective until one of the above conditions again prevails.

(f) *Penalty.*

Any person who violates this section shall be punished by a fine of not more than five hundred dollars. The removal of each unit shall constitute a separate violation. Where, after a hearing, the Board finds there are repeated and/or flagrant violations of this section, the Board shall recommend to the Cambridge City Council or to the Cambridge Housing Authori'y that the public interest can best be served by taking the unit(s) by power of eminent domain in order to restore the unit(s) to service as housing for people with low and moderate incomes.

(g) *Equitable relief.*

The Board or any person aggrieved by a failure to comply with this section may enforce its provision in a civil action for injunctive or declaratory relief.

(h) *Severability.*

The provisions of this section are severable. If a court declares invalid any such provision, or its application to any person or circumstance, the invalidity shall not affect the validity of any other provision or application.

Chapter Twenty-Three including all of the following amendments:

—Ordinance 966 ordained on June 29, 1981 — c1/2

—Ordinance 980 ordained on April 26, 1982 — (b) (4)(i)
—Ordinance 993 ordained on January 27, 1983 (abolished ombudsperson)
—Ordinance 1001 ordained on August 8, 1983 — d1/2
—Ordinance 1014 ordained on August 15, 1984 — by — vacancy amendment

CAMBRIDGE RENT CONTROL BOARD REGULATIONS

REGULATION SERIES NO. 13 — Definitions

13-01 The following words or phrases as used in these Regulations, the Rent Control Act or Ordinance 966 shall have the following meanings:

(a) "The Rent Control Act" or "Act", the Massachusetts Rent and Eviction Control Enabling Act, St. 1970, c. 842 or the Cambridge Rent and Eviction Control Enabling Act, St. 1976 c.36.

(b) "Building," any structure treated as separate for the purposes of Rent Control taking into account the following considerations:

1) Historical use and ownership,
2) How the property is assessed,
3) How the property is described in the Deed, and
4) The physical characteristics of the property, including, but not limited to, separation of utilities, existence of an approved fire wall, and other physical characteristics deemed relevant. Changes in physical characteristics made after February 13, 1985 shall not be taken into account.
5) In the case of subdivided property, the following additional factors shall be considered:

a. whether a subdivision has been recorded in the Registry of Deeds;
b. whether the subdivision has been approved by the Board of Zoning Appeals where required; and
c. whether the subdivision complies with applicable Zoning and Building Code requirements.

Approval of the subdivision by the Board of Zoning Appeals shall not be determinative of whether the subdivided property constitutes separate building(s).

(c) "Board", the Rent Control Board appointed by the City Manager pursuant to Section 5 of the Rent Control Act in the City of Cambridge.

(d) "Consideration for Use and Occupancy", the phrase "consideration . . . demanded or received . . . in connection with the use or occupancy of rental units or the transfer of a lease of such rental units" in the definition of "rent" in Section 3(c) of the Act shall include monies demanded or paid for parking, furniture, appliances, or subletting.

(e) "Controlled rental unit", any dwelling unit within the City of Cambridge which is not contained in a two or three-family owner occupied building or which has not been specifically exempted, excluded or otherwise decontrolled by the Rent Board or the Rent Control Act.

(f) "Covenent", any oral or written agreement between landlord and tenant that constitutes a part of the legal relationship between them.

(g) "Adjudicatory proceeding," the proceeding, including fact-finding and Board hearings, in which the legal rights, duties or privileges of specifically named persons or other entities are determined;

adjudicatory proceedings shall be conducted in accordance with those provisions of General Laws c. 30A made applicable to the Board by c. 399 of the Acts of 1985; applications for a Certificate of Eviction, petitions for a Rent Adjustment, Tenant Complaints, Full Occupancy Complaints, Removal Permit Applications, Special Case Adjudications and other Complaints are adjudicatory proceedings.

(h) "Health Codes", the State Sanitary Code, the Housing Code and Building Code of the City of Cambridge. When used in these regulations, the term "substantial code violation" shall mean any housing condition, the existence of which, in the Board's opinion, violates Article II of the State Sanitary Code, or any other statute, ordinance or regulation relative to any condition of residential premises and which may endanger or materially impair the health or safety and the well-being of any person, and which was not caused by the tenant or occupant of the unit, including without limitation, the following conditions:

(1) frequent lack of sufficient water supply;
(2) frequent lack of sufficient heat or hot water;
(3) curtailment of service such as gas or electricity;
(4) defective electrical wiring or outlets;
(5) exposed electrical wiring or outlets not properly covered;
(6) roof or wall leaks;
(7) defective drains, sewage systems or toilet facilities;
(8) infestation of insects or rodents;
(9) lead paint on interior of dwelling or on exterior of dwelling where paint is so located or in such condition as to create a hazard of lead poisoning to children of the occupants;

(10) insufficient number of acceptable exits from a dwelling or from each floor of a rooming house;
(11) obstructed exits;
(12) accumulation of garbage or rubbish in common area;
(13) plaster falling or in immediate danger of falling;
(14) dangerous porches, stairs or railings;
(15) floors, walls or ceiling with substantial holes;
(16) doors or windows not sufficiently weather tight;
  i) to permit room temperature to be maintained at 68 degrees F where the landlord supplies heat as part of the rent, or
  ii) to prevent excessive heat loss where the tenant pays for heat separately from the rent.
(17) doors lacking locks conforming to building code regulations;
(18) inadequate ventilation facilities in interior bathrooms.

(i) "include, includes or including", including but not limited to.

(j) "Landlord", the owner or, except for the purposes of Regulations 13-01(o), 13-01(p) and 58-01 and Section 9(a)(8) of the Act, the owner's agent.

(k) "Owner-occupied," a rental unit is owner-occupied when the owner of the unit occupies the unit in good faith as a principal residence on a day-to-day basis with the intention of living there indefinitely as an owner. Where an owner obtains any Notice of Ruling or other determination from the Board of owner occupancy in any case, including without limitation applications for certificates of eviction and special case exemptions, if the owner

moves from the unit within one year from the date of commencement of occupancy, the Board may hold a hearing as to whether the property was owner-occupied within the meaning of this section.

(l) "Party," for the purposes of participating in a Board proceeding means: (a) the specifically named persons or entities whose legal rights, duties or privileges are being determined in the proceeding; and (b) any other person who as a matter of constitutional right or by any provision of the Rent Control Act or Board regulations is entitled to participate fully in the proceeding, and whom upon notice makes an appearance; and (c) any other person allowed by the Board to intervene as a party.

(m) "Representative", any person who appears as attorney, accountant or manager with the consent of the person for whom such appearance is made or any other person who appears for any party with the consent of the party and the Board or the Board's representative;

(n) "Working day", any day of the week except Saturday, Sunday, or County, State or Federal legal holidays.

(o) "Finder's fee", any fee paid by a tenant to a licensed real estate broker or agent, other than the landlord, for the opportunity to examine or lease any controlled rental unit.

(p) "Service charge", any fee paid by a tenant to his landlord which is thereafter paid by the landlord to a licensed real estate broker or agent, other than the landlord, for the opportunity to examine or lease any controlled rental unit.

(q) "Two or three family house," a building containing two or three residential units and, if appli-

cable, no more than one commercial unit. The gross floor area of the commercial unit shall not exceed the gross floor area of the residential rental units. Any building in which the number of rental units is reduced by combination without a removal permit, as defined in Regulation 48-03, shall remain subject to the Rent Control Act and shall not be exempt pursuant to Section 3(b)(6).

(r) (1) "Owner", for the purposes of Section 3(b)(6) of the Act and except as provided in paragraph #2 of this regulation, any person holding no less than 50% of the actual beneficial title to real estate or, in the case of an owner occupant, any person who together with other owner occupants, holds no less than 50% of the actual beneficial title in the aggregate. This section shall apply to ownership interests created after March 20, 1986.

(2) Where an owner transfers an interest in real estate to a family member as defined by section 9(a)(8) of this Act then that transferee may be considered an owner if he or she holds no less than 33⅓% of the actual beneficial title to the real estate, provided that no less than 50% of the beneficial title is held by family members as defined by Section 9(a)(8) of the Act.

(3) For the purposes of Section 9(a)(8) of the Act, an owner is any person holding no less than 17% (1/6th) of the actual beneficial title to real estate, except an owner of real estate containing less than six (6) rental units must, for the purpose of Section 9(a)(8), hold actual beneficial title as follows:

(i) five (5) rental units — no less than 20% (1/5th)

(ii) four (4) rental units — no less than 25% (1/4th)

(iii) three (3) rental units — no less than 33% (1/3rd)

(iv) two (2) rental units — no less than 33% (1/3rd)

(v) one (1) rental unit — no less than 33% (1/3rd)

(4)* The Board shall consider the following factors in determining actual beneficial ownership:

(i) The extent to which the person contributed consideration or capital for his or her interest;

(ii) The extent to which the person actually receives income from the property;

(iii) The extent to which the person pays the expenses of the property;

(iv) The extent to which the person participates in management or has a right to participate in management of the property;

(v) Whether the interest is transferable or alienable; and

(vi) Other facts and circumstances which may be relevant in any given case.

(s) "Ordinance", Ordinance 926 of the Code of the City of Cambridge entitled "Chapter Twenty-Three. Regulations Pertaining to Controlled Rental Housing Units", as passed by the Cambridge City Council on August 13, 1979, and all subsequent amendments thereto, including, but not limited to Ordinances 966 and 980.

(t) "Removal Permit Proceeding", the procedures by which the Board determines whether a removal permit shall be granted.

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*Correction from Regulation Book.

(u) Repealed 9/25/86.

(v) "Same Person", as used in Section (b)(4)(i) of the Ordinance shall mean the last previous occupant as defined above in 13-01(u).

(w)* "Owner of a building", as used in Section 1(b)(4) of the Removal Permit Ordinance shall mean all owners except multiple owners of a building who, after August 10, 1979, occupy or seek to occupy more than half the units in a building of four or more units, or more than five units in a building of ten or more units, and who are not family members as defined by Regulation 57-01(b)(i). A building occupied in such a way shall be considered a de facto cooperative, the creation of which requires a removal permit.

(x) "Rental Units in Cooperatives", for the purposes of section 3(b)(4) of the Act, shall be those units occupied by stockholders of the cooperative.

(y) "Continuously occupied", as used in Ordinance 980 and Regulation 13-01(u) shall mean that the tenant occupied the unit as his/her principal residence. If said tenant was physically absent from the unit for a period greater than three months, there shall be a rebuttable presumption that the tenant did not continuously occupy the unit.

(z) "Rooming or boarding house units", as used in Section 3(a) of the Rent Control Act shall mean single rooms rented or offered for rent. In determining whether or not a rental unit is a rooming or boarding house unit, the Board shall consider the following, among other factors:

(a) how the units are registered with the Board;

(b) whether the units are or have been licensed by the Cambridge Licensing Commission;

*Regulation 13-01(w) passed by the Board on October 14, 1987. Effective as amended October 15, 1987.

(c) the historical use of the property;
(d) the absence of private kitchen and/or bath facilities; and
(e) the method by which rent is computed.

(aa) "Legal unit owner", as used in Section 1(b)(4)(v) of the Ordinance, shall be defined in accordance with regulation 13-01(r).

(bb) "Vacant", as used in Section 1(b)(4)(v) of the Ordinance, shall mean that a unit is not occupied by a bona fide tenant.

(cc) "Cited as unfit for human habitation", as used in Section 1(b)(4)(v) of the Ordinance shall mean issuance of written notice from the Department of Inspectional Services that the unit is unfit for human habitation.

REGULATION SERIES NO. 46 —
Removal Permit Proceedings

46-01 Removal Permit Proceedings shall be commenced in accordance with the provisions of these regulations.

46-02 Where the applicant fails to comply substantially with these regulations, the Board may deny the Application for a Removal Permit.

46-03 Applications for Removal Permits filed with the Rent Control office by Friday at 1:00 p.m. shall be assigned for hearing the immediately following Wednesday at 9:00 a.m. at the Rent Control office. If a holiday falls on a Wednesday, the hearing originally scheduled for the holiday will be held on the Wednesday immediately following.

46-04 The following documents and/or actions, where applicable, are required to accompany Applications for Removal Permits filed at the Rent Control office:

(a) Where tenants occupy the unit(s) for which a removal permit is sought, an "officer's return of

service" indicating that the notice of hearing has been delivered in hand or left at the last and usual address of the tenants by a constable or a sheriff. Such service shall be made at least fourteen (14) days prior to the date of the hearing.

(b) In addition to the above requirement, whenever a permit is sought in a building containing any occupied units, regardless of whether the permit is sought for an occupied or vacant unit, the applicant shall either post a notice of the time, date, place and purpose of the hearing at all regularly used entrances to the building — or mail, by first class postage, copies of such notice to all occupants then residing in the building. In addition, the applicant shall mail an affidavit to Rent Control so as to arrive before the hearing date, which affidavit shall specify the manner of notice given and the date notice was posted or mailed. The action of posting or mailing notices must be completed at least fourteen (14) days prior to the date of hearing.

(c) In addition to the above requirement, whenever a permit is sought the applicant shall mail by first class postage, at least fourteen (14) days prior to the date of the hearing, notice of the time, date, place and purpose of the hearing to all persons or organizations appearing on an official list maintained for that purpose at the Rent Control office, and the applicant shall specify the date and manner of said notice in an affidavit which shall be mailed to the Rent Control office so as to arrive before the hearing date.

(d) With regard to such a list as referred to in (c) above, interested persons or organizations must request and receive approval from the Executive Director for placement on that list, and it shall be

within the discretion of the Board to limit the number of entries or to refuse for good cause, entry on the list. In no event shall the list be allowed to exceed fifteen (15) entries.

(e) The Board may, where it deems necessary, order notice by publication in removal permit cases.

(f) It shall be the applicant's responsibility to send notice as specified above, and to bear the costs of doing so.

46-05 The form for an Application for Removal Permit, the notice of a hearing, tenant response form and affidavits shall be provided by the Rent Control office. The notice of the hearing shall meet all the requirements of Regulations 32-02 and 32-03.

46-06 Applications for Removal Permits shall be dismissed unless service and/or notice, as required under this Regulation Series, is made within the time limits specified in regulation 46-04.

46-07 The hearing shall be conducted in accordance with the provisions of Regulation Series Nos. 34 through and including 41.

46-08 In considering whether to grant or deny a removal permit, the Board may consider any evidence which bears on an application, including, but not limited to, the following factors:

(a) The condition of the housing involved, and the prospects that capital needed to maintain it as rental housing will be available;

(b) The present and likely future rent structure in the building, including likely increases which would result from major improvement, renovation or rehabilitation;

(c) Whether, for how long and for what reasons a building or unit has been abandoned or vacant;

(d) Whether, and to what extent units in a building are owner-occupied;

(e) Tenant's age, financial status, occupation and health generally;

(f) Length of tenant's occupancy in the unit, building or neighborhood involved;

(g) Size and make-up of tenant's family if unit so occupied;

(h) Comparable housing available to the tenant, including housing actually made available to tenant by applicant;

(i) Other financial arrangements offered by applicant;

(j) Statistical data about the housing market in Cambridge, or within particular neighborhoods, including number of rental units, number of vacant rental units, new construction or the like. In this regard, the Board on occasion may publish and take notice of such factual data as can be developed from its records or otherwise is available to it;

(k) Prior denials of Applications for Removal Permits.

(l) When a permit is sought to combine two or more controlled rental units or rooms in a rooming or boarding house in order to provide a residence for the owner, the following additional factors may be considered:

(1) the size and composition of the owner's family, if any;

(2) whether the owner and family require the amount of space that would result from the combination of units or rooms;

(3) the length of time that the owner intends to reside at the property;

(4) whether and for how long the owner intends to maintain the property as a rooming or boarding house;

(5) the length of time the property has been used as a rooming or boarding house;

(6) the number of units or rooms sought to be removed compared with the number that will continue to be rented;

(7) whether there are any alternative housing arrangements at the property available to the owner;

(8) whether the issuance of the permit will result in a present or future exemption of the property from rent control;

(9) whether the current owner has the ability and/or financial resources to maintain the property as a rooming or boarding house if the permit is not granted.

46-09 (a) When an Application for a Removal Permit is denied, no further application may be filed by any person for six (6) months from the date of denial, and no application may be filed by the same applicant unless the Board grants permission to reapply based upon its satisfaction that some significant change has occurred regarding material facts.

(b) Requests to reapply shall be made on a form prescribed by the Board and be accompanied by an affidavit which specifies the facts which have changed and the manner in which those facts have changed. Requests to reapply shall be heard by the Board.

(c) In no event shall the Board allow more than two (2) Applications for Removal Permits to be filed against any unit within any twelve (12) month period.

(d) Removal permits granted by the Board shall be transferable from developer to purchaser and thereafter shall run with the unit for which it was

granted, until the unit is removed from the market.

46-10 The grant of a removal permit shall not eliminate an owner's obligation to comply with the requirements for a Certificate of Eviction when possession of the unit is sought. However, both an Application for a Removal Permit and Application for a Certificate of Eviction may be filed together and if so filed, may be joined and heard together. When such joint filing is to be made, the hearing date chosen by the applicant must be a Wednesday which allows the notice requirements for both proceedings to be satisfied.

46-11 When a removal permit is granted, a unit shall nevertheless remain subject to all applicable provisions of the Act and Regulations until such time as it is actually removed from the rental market, and shall be subject to controls once again, if and when the unit returns to the rental market and is otherwise not exempt from the provisions of the Act and these Regulations.

46-12 Residential occupancy as referred to in Section 1(b)(4)(iii) of the Ordinance shall mean reasonable residential occupancy. In determining reasonableness, the Board shall consider, among other factors, the following: the extent and nature of the deprivation or interruption of essential services (including, but not limited to, heat, electricity, water, gas); the length of time the rehabilitation, repair, or improvement will take to complete; the scope of the work and the section of the Building Code under which the work is being done; and the dollar cost of the work.

Actual occupancy during rehabilitation, repair or improvement does not create a presumption that such occupancy is reasonable.

(a) For the purposes of Section 1(b)(4)(v) of the Ordinance, a "bona fide" tenancy may be established by some combination of the following:

a lease or tenancy-at-will agreement,
proof of payment of rent or other consideration,
length of tenancy,
the presence of a tenant's personal belongings and furnishings in the unit.

(b) In determining whether an owner has "refused to rent" a unit or "offer [a unit] for rent in good faith" under Section 1(b)(4)(v) of the Ordinance, the Board shall consider the following factors:
   (1) bona fide offers by potential tenants to rent the unit;
   (2) the extent of effort on the part of the owner to rent the unit. This may include advertisements in newspapers and posting of the vacancy in housing offices or on public bulletin boards; and
   (3) any other factors that the Board, in its discretion, determines are appropriate.

(c) For the purposes of Section 1(b)(4)(v) of the Ordinance, a showing of "good cause" for a habitable unit may include, but is not limited to, the following factors:
   (1) a pending case before the Board relating to the status of the unit as a controlled rental unit; or
   (2) evidence that a relative, as described in section 9(a)(8) of the Rent Control Act, of an owner of an owner-occupied building will occupy the unit within a reasonable period of time.
   (3) evidence that the unit was the last previous primary residence of the legal unit owner and that the unit is put on the market for sale in good faith, except that this provision shall only apply to single-family and two or three-family houses.

(d) For the purposes of Section 1(b)(4)(v) of the Ordinance, in the case of a unit found to be unfit for human habitation by the Department of Inspectional Services, an owner may make a showing of good cause by providing either:

(1) that s/he is making the repairs required for habitability and is pursuing completion of those repairs with due diligence; or

(2) that s/he is unable to make the repairs required for habitability in a timely fashion because the necessary approvals or financing have not yet been received from public agencies, including private non-profit housing rehab agencies which receive public funds. In this case the one hundred and twenty (120) day period required to establish vacancy may be extended up to an additional six (6) months at the discretion of the Rent Control Board, provided that applications for such approvals and/or financing have been filed in a timely manner.

(e) For the purposes of Section 1(b)(4)(v) of the Ordinance, a unit remains the "primary residence of a legal unit owner" if the owner is temporarily residing elsewhere, provided that the owner intends to return to the unit as his/her primary residence.

46-13 (a) Investigation of an alleged violation of Section 1(b)(4)(v) of the Ordinance shall be initiated either upon the receipt by the Board, on a form provided by the Board, signed under the penalties of perjury, on the complainant's personal knowledge of vacancy of a unit for more than one hundred and twenty (120) days or upon the Board's own initiative. If the complaint is not issued by the Board, the form shall include a statement that the complainant is willing to testify before the

Board as to the information provided in the form. If the complaint is initiated by the Board, it shall be upon the determination by the Executive Director or his/her designee that probable cause exists for the investigation. Probable cause shall be determined after an inspection of the building by the Board staff.

(b) Upon receipt of *a complaint,** the Board shall send notice to the unit owner informing him/her of the information received and of his/her right to make a showing of compliance for a habitable unit by providing documentation of any of the following:

(1) that s/he has rented the unit in good faith and that there is a bona fide tenancy, as described in Regulation 46-12(a); or

(2) that s/he has offered the unit for rent in good faith for a substantial portion of the one hundred and twenty (120) day period, but *has been unable to rent the unit; or**

(3) that s/he has failed to rent the unit for reasons of good cause, as set forth in Regulation 46-12(c).

The Board shall also inform the owner that it reserves the right to inspect the premises.

The documentation shall be provided to the Executive Director within 21 days of the date of the notice. The response from the owner shall include a description of the present status of the unit with relevant documentation. If the unit has been rented, the documentation shall include the name, address, and phone number of the present tenant. If the unit is not presently rented, the documentation shall include the name, present address or forwarding mail address, and present phone number, if available, of any tenant who has occupied

*Correction from Regulation Book.

the unit within the last 120 days. If the unit has not been occupied within the last 120 days, the documentation shall include evidence of good cause for failure to rent.

(c) If there is no response within twenty-one (21) days of the date of the Board's notice, the Board, through a hearing officer, shall schedule a hearing. Any such hearing shall be conducted in accordance with Regulation Series Nos. 34 through and including 41.

(d) If the documentation of an existing tenant or former tenant is received, the Board shall send a letter to the named tenant or former tenant asking for confirmation of present tenancy, or in the case of a former tenant, tenancy within the last one hundred and twenty (120) days. If confirmation is not received or documentation is deemed inadequate, within twenty-one (21) days of the date of the notice the Board shall schedule a hearing before a hearing officer in accordance with Regulation Series Nos. 34 through and including 41.

(e) If confirmation is received from a present tenant or former tenant or if documentation establishes no failure to comply with the Ordinance, the case shall be dismissed without a hearing. Notice of dismissal shall be sent to the complainant. Notice of the receipt of documentation shall be sent to the complainant, and the complainant shall be given the opportunity to comment on the documentation.

(f) At any point in proceedings before the Board pursuant to Section 1(b)(4)(v) of the Ordinance, an owner may make a showing that a bona fide tenant has been accepted and is currently occupying the unit. Upon such a showing, the case shall be dismissed.

46-14 (a) Persons who have received a removal permit on or after October 1, 1984, are subject to the following regulations on review of removal permits.

(b) One year after the Board has issued a removal permit, it shall review the permit to determine if the circumstances and conditions which led to the granting of the permit continue to warrant the permit. The Board shall post for public inspection a list of those units for which the Board is reviewing a removal permit.

(c) For any unit being reviewed, the Board shall send a Review Form to the owner. The form shall request information regarding the circumstances and conditions of the rental unit being reviewed.

(d) The Board shall allow twenty-one (21) days from the date on the Review Form for the submission of affidavits and documentary evidence by all interested persons before the Board shall make any decision confirming or rescinding a removal permit.

(e) If the Board determines that there is no probable cause to believe that the circumstances and conditions which led to the granting of the permit have changed, then the Board, or its designee, shall confirm the removal permit. If the Board determines that there is probable cause to believe that the circumstances and conditions which led to the granting of the permit have changed, then the Board shall hold a hearing in accordance with Regulation Series Nos. 34 through and including 41. In making any determination under this section, the Board shall give great weight to whether the owner has acted in good faith.

(f) (1) If the Board finds after a hearing held pursuant to Regulation 46-14(e) that the circumstances and conditions no longer warrant the

unit's removal from the market under the Ordinance Section 1(b)(4), the removal permit shall be declared null and void and rescinded. In making any determination under this section, the Board shall give great weight to whether the owner has acted in good faith. The Board shall send the permit holder a notice of the decision to confirm or to rescind the removal permit. The decision to confirm or to rescind a removal permit is appealable in accordance with Regulation Series No. 42.

(2) If the Board rescinds a removal permit for a unit, no person may apply for a new removal permit for that unit for twelve (12) months from the date of rescission.

(a) The penalty provision in the last sentences of Section 1(f) of the Ordinance is intended to be further means for enforcing the provisions and furthering the purposes of the Rent Control Act and the Removal Permit Ordinance.

b) Recommending a taking by eminent domain pursuant to Section 1(f) of the Ordinance will be one of the actions the Board may take after it has found that the permit holder has repeatedly and/or flagrantly violated the Ordinance. The Board shall consider recommending a taking by eminent domain at the same hearing at which the Board determines whether the Ordinance has been violated. The decision whether to make the recommendation shall be made only if the Board first finds a violation of the Ordinance.

(1) for buildings of four (4) to six (6) units, at least one unit, which shall contain at least two (2) bedrooms;

(2) for buildings of seven (7) to ten (10) units, at least two (2) units, both of which shall contain at least two (2) bedrooms;

(3) for buildings of eleven (11) to fourteen (14) units, at least three (3) units, all of which shall contain at least two (2) bedrooms; and

(4) for buildings of fifteen (15) or more units, at least twenty-five percent (25%) of the units, half of which shall contain at least two (2) bedrooms.

The number of units remaining available for low and moderate income tenants shall be based on the number of units contained in the current Rent Control Board records or the number of units resulting from the proposed plan, whichever serves the purposes of this Subsection.

The bedroom requirement may be modified where the Board determines that such modification would serve the purposes of this Subsection.

REGULATION SERIES NO. 48 — Additional Removal Permit Requirements

48-01 No exemption from the Rent Control Act may be claimed or allowed if the exemption would result from act(s) which violate(s) any provision of the Rent Control Act, the Removal Permit Ordinance, or the Rent Control Board Regulations.

48-02* When a controlled rental unit is rehabilitated, repaired or improved (including but not limited to interior gutting of the unit) to such an extent that a new construction exemption may be claimed, the unit is not exempt under Section 3(b)(2) of the Rent Control Act unless *an application for* a removal permit, pursuant to the

*Changes adopted by a vote of the Rent Control Board (4-0) March 9, 1988. Effective, March 11, 1988.

Removal Permit Ordinance and Rent Control Board Regulations *was filed prior to February 1, 1988 or pursuant to Regulation Series 47, and the permit* was obtained prior to the rehabilitation, repair or improvement. *In all other circumstances, a new construction exemption under Section 3(b)(2) of the Rent Control Act may only be recognized in accordance with Regulation 13-01(dd).*

48-03 The combination of two or more controlled rental units by the elimination of bath or kitchen facilities, or by structural changes which prevent habitability as separate units, requires a removal permit(s) pursuant to the Removal Permit Ordinance and the Rent Control Board Regulations. Failure to obtain the necessary removal permit(s) constitutes a violation of the Removal Permit Ordinance. This regulation applies to non-condominium units occupied by the owner of the building in which they are located, as well as to all other controlled rental units.

48-04 When two or more units have been combined, as defined in Regulation 48-03, without a removal permit, the building in which the units are located shall not be considered a two-family or three-family house pursuant to Section 3(b)(6) of the Rent Control Act and shall remain subject to the Rent Control Act, Removal Permit Ordinance and Rent Control Board Regulations.

48-05 The rental or reservation for rental of any unit, which was a controlled rental unit on or after August 10, 1979, to persons required as a condition of their tenancy to rent the unit for a period of less than fourteen (14) days requires a removal permit pursuant to the Removal Permit Ordinance and the Rent Control Board Regulations. Failure to obtain the necessary removal permit(s) constitutes a violation of the Removal Permit Ordinance.

48-06 Conversion of a controlled rental unit from a housing to a nonhousing use requires a removal permit pursuant to the Removal Permit Ordinance and the Rent Control Board Regulations. Failure to obtain the necessary removal permit(s) constitutes a violation of the Removal Permit Ordinance.

48-07 Any unit which is a controlled rental unit on Februaru 1, 1984 shall not become exempt, pursuant to Section 3(b)(5) of the Rent Control Act, without a removal permit and shall remain subject to the Rent Control Act, Removal Permit Ordinance and Rent Control Regulations. This provision includes, but is not limited to, a unit owned or leased by a university and rented or reserved for rental to persons having or required to have an affiliation with that university.

48-08 The rental units in a building as set forth in the Removal Permit Ordinance Section 1(b) last paragraph, shall not be deemed exempt from the Act pursuant to Section 3(b)(6) where the building was subdivided, as defined in Board Regulation 13-01(b)(5), unless and until the Rent Control Board issues a removal permit pursuant to the Removal Permit Ordinance. The approval of a subdividion by the Board of Zoning Appeals shall not be determinative of the building's status for rent control purposes. Failure to obtain the required removal permit constitutes a violation of the Removal Permit Ordinance.

48-09 The occupancy by an owner of more than one rooming or boarding house unit requires a removal permit. In determining whether to grant a removal permit for such occupancy, the Board shall apply Regulation 46-08(1), which provides for owner occupancy and physical combination of rooming or boarding house units; and shall also consider the length of time the rooming or boarding house has been so operated; when such use was commenced; and the number of rooms so rented.